CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE COURT'S RULES

In the United States Court of Appeals for the District of Columbia Circuit

No. 20-1324

KERYN NEWMAN AND ALISON HAVERTY,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: MARCH 26, 2021

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' Circuit Rule 28(a)(1) certificate.

B. Rulings Under Review

1. *Potomac-Appalachian Transmission Highline, LLC*, "Order on Rehearing, Directing Briefs, and Accepting in Part and Rejecting in Part Compliance Filings," Opinion 554-A, 170 FERC ¶ 61,050 (Jan. 24, 2020), R.383, JA467–515;

   and

2. *Potomac-Appalachian Transmission Highline, LLC*, "Order Addressing Arguments Raised on Rehearing," Opinion 554-B, 172 FERC ¶ 61,048 (July 16, 2020), R.402, JA576–96.

C. Related Cases

This case has not previously been before this Court or any other court. To counsel's knowledge, there are no related cases pending elsewhere.

/s/ Jared B. Fish
Jared B. Fish

March 26, 2021

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GLOSSARY

A	Addendum
Br.	Petition for Review of Keryn Newman and Alison Haverty
Certificate	Certificate of public convenience and necessity
Commission or FERC	Respondent Federal Energy Regulatory Commission
Contractor expenses	Expenses incurred by PATH's public polling contractor, R.L. Repass, and its public relations contractor, Charles Ryan Associates (and its subsidiaries), the latter of which managed the state Coalitions and the Path Education and Awareness Team
P	Internal paragraph number in a FERC order
PATH	Potomac-Appalachian Transmission Highline, LLC
PATH Education and Awareness Team or Education Team	Organization created by PATH to educate the public about the PATH Project
PATH Project or Project	The Potomac-Appalachian Transmission Highline Project

PJM or system operator	PJM Interconnection, L.L.C., a regional transmission organization
Ratepayer Petitioners or Petitioners	Petitioners Keryn Newman and Alison Haverty
Reliable Power Coalitions or Coalitions	West Virginia, Virginia, and Maryland organizations consisting of individuals, businesses, and civic groups that sought to build public support for the PATH Project

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STATEMENT OF THE ISSUES

The PJM Interconnection, L.L.C. manages the interstate transmission grid in 13 States plus the District of Columbia. As a regional transmission organization regulated by the Federal Energy Regulatory Commission ("Commission" or "FERC"), PJM is tasked with ensuring reliable and efficient transmission of electricity for the public good.

In 2007, PJM identified a reliability deficit on its grid. As part of a FERC-approved expansion plan, PJM chose a $2.1 billion, 275-mile

transmission line as the solution. The line would begin in West Virginia, traverse Virginia, and end in Maryland. Exercising its broad authority, PJM ordered two of its member utilities, Allegheny Energy, Inc. (now FirstEnergy Corporation) and American Electric Power, to build the line. Those companies formed a joint venture, Potomac-Appalachian Transmission Highline, LLC ("PATH"), to carry out PJM's directive. But to proceed with the project, PATH first needed to secure certificates of public convenience and necessity from the West Virginia, Virginia, and Maryland public utilities commissions.

What occurred next is the focus of this appeal. To inform the public of the PJM-determined benefits of the transmission line, PATH contracted with a public relations firm. That firm, Charles Ryan Associates, in turn managed state coalitions and an educational outreach team that marshaled public support and parried advocacy by opposition groups. Collectively, these organizations met with labor and business leaders, reached out to affected property owners and the general public, engaged in media tours, and recruited individuals to write letters-to-the-editor and speak at public hearings.

PATH billed most of these contractor-related expenses to FERC-approved accounts governing either "fees and expenses of professional consultants and others for general services," or "general advertising." After initially rejecting these accounting assignments, on rehearing the Commission explained that they were, in fact, appropriate.

Petitioners Keryn Newman and Alison Haverty (FirstEnergy ratepayers) object. They argue that all the contractor expenses plainly fall under an account covering political lobbying activities. And because that account is not included in PATH's FERC-approved formula rate (i.e., the rate charged customers), if Ms. Newman and Ms. Haverty are correct, then PATH cannot recover the money spent to inform the public of, and build support for, the PJM-commissioned transmission line.

The questions presented for review are:

1. Did the Commission, in construing its own ambiguous accounting regulation (Account 426.4, governing certain political activities), reasonably decide that the contractor-related expenses, which were directed at securing state certificates of public convenience and necessity, did not relate to influencing public opinion on an activity covered by the Account—namely, approval of a "franchise"?

2. Did the Commission, in construing a different clause of Account 426.4, reasonably decide that the regulation covers only expenses aimed at directly influencing the decisions of public officials, and that substantial evidence shows the contractor-related expenses concerned, at most, *in*direct influence?

3. Did the Commission, in construing its own ambiguous accounting regulation covering "fees and expenses of professional consultants and others for general services" (Account 923), reasonably decide that PATH properly billed most of its contractor-related expenses to that Account?

4. Did the Commission, in construing its own ambiguous accounting regulation covering "general advertising" (Account 930.1), reasonably decide that PATH properly billed contractor-related advertising expenses to that Account, even though PATH's Formula Rate incorporates only part of that Account?

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are reproduced in the Addendum.

JURISDICTIONAL STATEMENT

The Commission agrees with the statement of jurisdiction provided by Petitioners Keryn Newman and Alison Haverty ("Ratepayer Petitioners" or "Petitioners") in their opening brief.

STATEMENT OF FACTS

I. Background

The PJM Interconnection, L.L.C. ("PJM" or "system operator") is a regional transmission organization responsible for managing the wholesale transmission and interstate sales of electric power across 13 States and the District of Columbia. *See, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004); PJM, "About PJM," *available at* https://www.pjm.com/about-pjm. In that role, PJM has an obligation to, among other things, "ensure electricity is reliably available for consumers." *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017); *see also* 18 C.F.R. § 35.34(a) (describing the purpose of regional transmission organizations as "promoting efficiency and reliability in the operation and planning of the electric transmission grid").

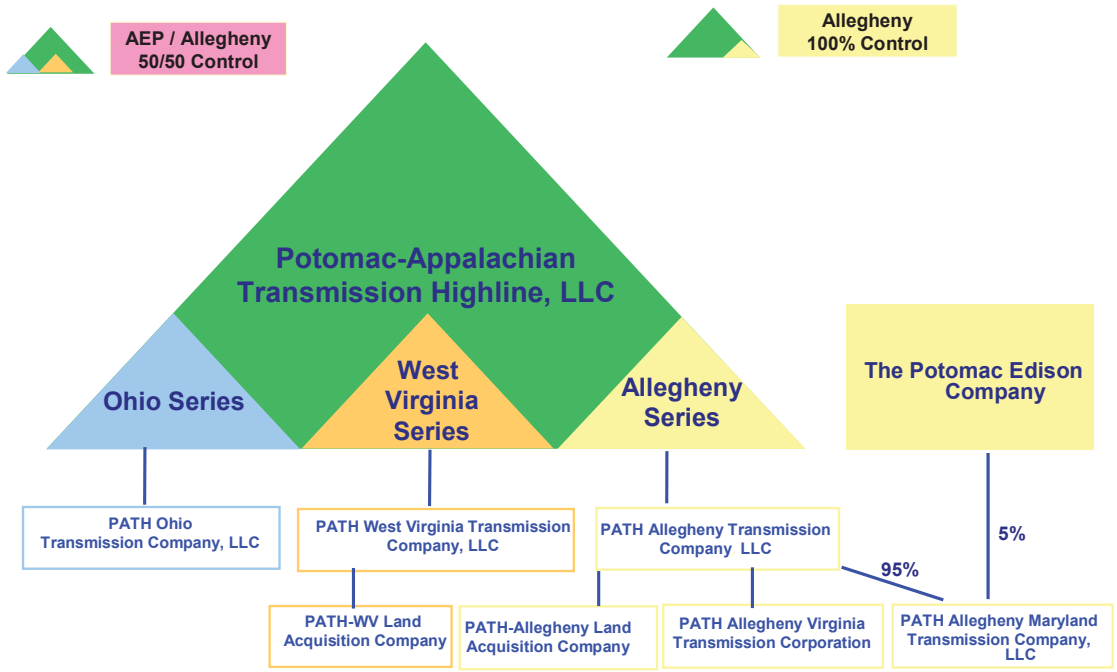
A. PJM orders two of its member utilities to build the PATH Project

In 2007, PJM decided that a new transmission line was critical to addressing a reliability shortfall on its electric grid. *Potomac-Appalachian Transmission Highline, LLC*, "Initial Decision," 152 FERC ¶ 63,025, P 10 (2015), JA306. It settled on the Potomac-Appalachian Transmission Highline Project ("PATH Project" or "Project"), a $2.1 billion, 275-mile line beginning in West Virginia, crossing Virginia, and terminating in Maryland. *Potomac-Appalachian Transmission Highline, LLC*, "Order on Initial Decision," Opinion 554, 158 FERC ¶ 61,050, P 2 (2017), JA333.

But PJM, which only manages transmission infrastructure owned by individual utilities, needed a builder. So it ordered two of its member utilities, Allegheny Energy, Inc. ("Allegheny," now FirstEnergy Corporation) and American Electric Power Company ("American Electric") to make the PATH Project a reality. *Id*. P 3, JA334. Those utilities, in turn, formed a joint venture, the Potomac-Appalachian Transmission Highline, LLC ("PATH"), which was tasked with both building the Project, and with securing the requisite state-level certificates of public convenience and necessity (the "Certificates") in

West Virginia, Virginia, and Maryland needed to operate the line. *Id*. PATH, in turn, organized itself into several state-specific subsidiaries, as depicted in this diagram:

Diagram 1 - PATH LLC Structure and Operating Companies



Source: Ex. JCA-96 at 8, JA270.

In late 2007, PATH filed proposed tariff sheets pursuant to Federal Power Act section 205, 16 U.S.C. § 824d, which the Commission approved in relevant part. *Id*. P 5, JA334–35; Initial Decision, P 11, JA307. PATH's Tariff includes a Formula Rate, which is the mechanism for billing ratepayers for a utility's incurred costs. *See* Initial Decision, P 11, JA307. "[A] formula rate specifies the cost components that form the basis of the rates a utility charges its customers." *Pub. Utils.*

Comm'n of Cal. v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001). A utility may, as PATH did here, include certain FERC-approved accounts as part of its formula rate. *See Potomac-Appalachian Transmission Highline, LLC*, "Order Addressing Arguments Raised on Rehearing," Opinion 554-B, 172 FERC ¶ 61,048, P 3 (2020), JA577–78. If a particular cost is recorded to an account that is also part of the formula rate, then that cost may be recovered from ratepayers. *Id*.

The Commission's accounting rules—the Uniform System of Accounts—are set forth in a dedicated section of the Code of Federal Regulations, 18 C.F.R. pt.101. As relevant here, PATH's Formula Rate includes Account 923 ("Outside Services Employed"), and some of Account 930.1 ("General Advertising Expenses"). *See* Initial Decision, P 19, JA310; *see also* Op. 554-B, PP 33, 42, JA590, 594. It does not, however, include another account pertinent to this appeal, Account 426.4 ("Expenditures for Certain Civic, Political and Related Activities"). Op. 554, P 49, JA351–52; *see also Potomac-Appalachian Transmission Highline, LLC*, "Order on Rehearing, Directing Briefs, and Accepting in Part and Rejecting in Part Compliance Filings," Opinion 554-A, 170 FERC ¶ 61,050, P 13 (2020), JA472–73.

B. PATH contracts with outside firms to assist in informing the public of, and building support for, the PATH Project

To support its Certificate applications, PATH contracted with two outside firms, Charles Ryan Associates and R.L. Repass (collectively, the "Contractors"). *See* Op. 554-A, P 68, JA500. Charles Ryan, in turn managed the Reliable Power Coalitions in West Virginia, Virginia, and Maryland (collectively, the "Coalitions"). *See* Op. 554-A, PP 67 n.162, 68, JA499–500; Ex. S-2 at 22, 24, JA145, 147. The Coalitions included individuals, businesses, and civic groups that worked to build public support for the Project and respond to opposition groups. Ex. PTH-7 at 9:15–16, JA45. PATH also created the PATH Education and Awareness Team (the "Education Team")—managed, too, by Charles Ryan—which "was formed to educate the public, as well as to create, promote, and collect signatures on public petitions supporting the PATH Project." Op. 554, P 28, JA343–44; Ex. S-2 at 22, 24, JA145, 147. Finally, R.L. Repass, a polling firm, monitored public support. Op. 554-A, P 68, JA500.

For the 2009 to 2011 period at issue in this appeal, PATH recorded approximately $6.2 million in public relations expenses, namely for

advertising, advocacy-building, and lobbying in support of the Certificate applications. Op. 554, P 22, JA341–42; Initial Decision, P 20, JA310–11. PATH has abandoned any claim to recovery of expenses related to "direct contact with decision-making officials"—specifically, lobbying by Larry Puccio and Access Point Public Affairs ("Access Point")—meaning those sums are not at issue in this appeal. *See* Op. 554-B, P 26, JA587–88. Ratepayer Petitioners *do*, however, dispute approximately $1.6 million billed by the Coalitions, $1.4 million billed by the Education Team, and $0.3 million billed by R.L. Repass. *See* Op. 554, P 28, JA343–44. PATH allocated those expenses, as relevant here, to two accounts: Accounts 923 and 930.1. *Id*.

C. Ratepayer Petitioners challenge PATH's accounting of the Contractor expenses

PATH recovered the disputed 2009, 2010, and 2011 Contractor expenses in its rates.[2] *See id.* PP 7–11, JA335–37. Ratepayer Petitioners challenged annual updates filed by PATH for each of these years, which were submitted for Commission review in 2010, 2011, and 2012. *Id*. PP 8, 11, JA336–37. Hearings were held in 2015 before an

[2] In 2012, PJM cancelled the PATH Project because the previously identified reliability issue no longer existed. Ex. PTH-1 at 4:11–14, JA8.

administrative law judge on the propriety of the charges. *Id*. P 12, JA337. The judge issued a decision later that year rejecting the accounting assignments of all the disputed Contractor expenses, and held that they all should have been booked to Account 426.4. *Id*. PP 23, 48, JA342, 351. And because Account 426.4 is not included in PATH's Formula Rate, the amounts were not, in fact, recoverable from ratepayers. *See id.* P 49, JA351–52; Op. 554-B, P 3, JA577–78.

The Commission initially affirmed. It read Account 426.4 as broadly capturing expenses of a political nature, and found that, because PATH's Contractor expenses aimed at securing Certificates—which required government action—they plainly qualified. *See* Op. 554, P 52, JA352–53.

The first clause of Account 426.4 provides that it "shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances … or approval, modification, or revocation of franchises." 18 C.F.R. pt.101, Account 426.4, Addendum ("A") 25. Notwithstanding the absence of "certificates" as one of the listed items, Opinion 554 found that acquiring a certificate falls "within the ambit of referenda,

legislation, ordinances, the grant of franchise [sic] *and the like*." Op. 554, P 52, JA352–53 (emphasis added).

Account 426.4's second clause states that the Account "shall include expenditures … for the purpose of influencing the decisions of public officials." 18 C.F.R. pt.101, Account 426.4, A25. Opinion 554 did not find that the Contractor expenses specifically fell under that provision. *See* Op. 554, P 53, JA353.

Finally, Opinion 554 found that Account 426.4's third clause did not apply. That clause provides that "[Account 426.4] … shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations." 18 C.F.R. pt.101, Account 426.4, A25. Because all the Contractor expenses aimed "to influence public opinion" on the Certificate applications, and thus qualified under the Account's first clause, Opinion 554 held that the account's third clause was inapposite. *See* Op. 554, P 54, JA353–54.

PATH sought agency rehearing.

II. The Orders on review

The Commission reversed on rehearing. In Opinions 554-A and 554-B, the Commission found that none of the disputed expenses qualified for Account 426.4. Regarding the first clause, the Commission explained that seeking a Certificate is not a listed item, meaning expenses directed at influencing public opinion for the purpose of securing a Certificate do not qualify. Op. 554-B, P 19, JA584.

As to the second clause, the Commission found that the best reading excludes activities that only *in*directly influence public officials' decisions by way of directly influencing public opinion. *Id*. P 21, JA585. The Commission also reasoned that its interpretation of Account 426.4 accords with its longstanding policy on cost recovery, which generally allows recouping from ratepayers expenses incurred to serve the public interests of grid reliability and quality of electric service. *Id*. PP 22–23, JA586–87.

Finally, the Commission approved PATH's assignment of most of its Contractor expenses to Account 923, which broadly covers "fees and expenses of professional consultants and others for general services." *See* Op. 554-A, PP 80, 82, JA506–07 (quoting 18 C.F.R. pt. 101, Account

923, A26). It also found that the remaining expenses recorded to Account 930.1 qualified as advertising under PATH's Formula Rate. Op. 554-B, PP 36–40, JA592–94. And because Accounts 923 and 930.1 are included in PATH's Formula Rate, the Commission's ultimate holding means PATH can recover these expenses from ratepayers. *See id.* PP 3, 5, JA577–79.

SUMMARY OF ARGUMENT

Potomac-Appalachian Transmission Highline, LLC incurred costs to generate public support for a transmission line that PJM, a FERC-regulated regional system operator, ordered it to build. The challenged orders, which permit recovery of such costs from ratepayers, reflect a reasonable interpretation of the Commission's ambiguous accounting regulations and PATH's Formula Rate. Accordingly, the Court should deny the petition for review.

At the threshold, Ratepayer Petitioners err in discerning unlawful agency action in the Commission's change-of-mind on rehearing. The Federal Power Act vests in FERC the prerogative to take a second look at its first decision, and to modify that decision in a final order upon a request for agency rehearing. The wisdom in that statutory design

manifests in difficult cases like this one, where the Commission confronted how best to interpret several of its accounting rules. Contrary to Ratepayer Petitioners' repeated assertions, altering an initial order—in this case, Opinion 554—is not the same as departing from a prior, *final* order.

The Act's rehearing requirement bore fruit here: the Commission's final resolution—set forth in Opinions 554-A and 554-B—reflects a better interpretation of its ambiguous regulation, Account 426.4. The Commission reasonably found that the Account's first clause—covering expenses aimed at influencing public opinion related to a specified list of items—does not apply to the disputed costs here, because seeking a certificate of public convenience and necessity is not one of those listed items. Nor does the Account compel the reading that "franchise"—which *is* on the list—includes certificates. Far from it: elsewhere the accounting regulations expressly distinguish franchises *from* certificates.

Nor does Account 426.4's second clause apply, which covers expenses related to influencing the decisions of public officials. Consistent with this Court's precedent, the Commission reasonably read

that clause as netting only activities aimed at *directly* influencing decisionmakers, and not all those activities that *in*directly do so by way of boosting public support. Further, substantial evidence supports the Commission's finding that, here, the disputed Contractor expenses involved only indirect attempts to influence public officials' decisions. And because those expenses targeted a public need—grid reliability—identified by PJM, allowing their recovery from ratepayers has the added virtue of according with the Commission's policy on cost recovery.

PATH assigned most of the disputed Contractor expenses to Account 923, which covers "professional consultants and others for general services." Ratepayer Petitioners hardly contest the applicability of that Account, and what argument they do make they failed to raise on rehearing before the Commission; it is therefore waived. In any event, the Commission's finding that the disputed expenses are properly recorded to this Account is reasonable given the Account's broad scope.

Finally, the Commission reasonably found that the balance of the disputed expenses qualify as advertising under Account 930.1, and that PATH's Formula Rate—which incorporates part of that Account—allows recovery here. While not pellucid, the Formula Rate reasonably applies

to advertising for the purpose of education or outreach. Such an interpretation harmonizes two different Formula Rate provisions that provide for such recovery. Further, substantial evidence supports the Commission's finding that PATH's advertising *was* education or outreach-related.

ARGUMENT

I. Standards of review

The Court analyzes FERC orders under the deferential "arbitrary and capricious standard of the Administrative Procedure Act[, 5 U.S.C. § 706(2)]." *Mo. River Energy Servs. v. FERC*, 918 F.3d 954, 957 (D.C. Cir. 2019) (internal quotations omitted). Review under this standard is narrow. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. "Rather, the court must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id*. (cleaned up).

Under this standard, the Commission's factual determinations are conclusive if "they are []supported by substantial evidence on the record as a whole." *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1294 (D.C. Cir. 1996). "The 'substantial evidence' standard requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (internal quotations omitted). Further, the question is not "whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision." *Id*.

Finally, the Commission's interpretation of PATH's filed Tariff is entitled to deference. *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 446–47 (D.C. Cir. 2005). So, too, is its construction of its own accounting regulations, if the given regulation is "genuinely ambiguous," implicates the Commission's "substantive expertise," and reflects its "fair and considered judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019) (internal quotations omitted).

II. The Commission reasonably found that the disputed expenses are not properly recorded to Account 426.4

Since 2006, the Commission has distinguished recovery for a utility's expenses incurred solely in its private pecuniary interest from those that "directly relate[] to maintaining the mission of a[] [system operator]." *ISO New England Inc.*, 117 FERC ¶ 61,070, P 49 (2006), *aff'd*, *Braintree Elec. Light Dep't v. FERC*, 550 F.3d 6 (D.C. Cir. 2008). Because a regional system operator's "mission" is to ensure reliable power for the public, it is reasonable to pass through reliability-related costs to ratepayers. *See id.*; *see also Advanced Energy Mgmt.*, 860 F.3d at 659 (explaining a system operator's obligation to ensure reliability); 18 C.F.R. § 35.34(a) (same). As the Commission has found and this Court has affirmed, that distinction holds regardless of whether the costs are for lobbying activities. *See Braintree*, 550 F.3d at 9–12 (affirming the Commission's determination that expenses, including certain "lobbying" expenses, were "properly recoverable" because they related to "issues of direct operating concern to the [system operator]" (internal quotations omitted)); *see also ISO New England*, 117 FERC ¶ 61,070, P 49.

Here, PJM found that the PATH Project was necessary for maintaining grid reliability—a paradigmatic public interest. *See* Initial Decision, P 10, JA306; Ex. PTH-79 at 5:22 – 6:3, JA193–94. Thus, the expenses incurred to advertise, promote, and educate the public about the Project—lobbying and otherwise—reasonably fall on the "recoverable" side of the line under the Commission's cost recovery policy. *See ISO New England*, 117 FERC ¶ 61,070, PP 49–50. In this case, as discussed below, adherence to that policy aligns with a reasonable interpretation of the Commission's ambiguous accounting regulations, and is based on substantial evidence in the record. *See* Op. 554-B, P 17, JA583 (explaining that "Account 426.4 [does] not clearly apply to the[] [disputed] amounts"); *see also id*. P 23, JA586–87 (same); *contra* Br. 50 (erroneously asserting that the Commission found no ambiguity).

Further, contrary to the critique pervading Ratepayer Petitioners' brief, the Commission did not violate rules of reasoned decisionmaking by changing course on rehearing. *See, e.g.*, Br. 2, 23–24, 27, 31, 43, 52 (accusing the Commission of "contradict[ing] itself"). An agency's duty to explain a departure from a prior final order in an administrative

proceeding, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 507–11, 515 (2009), does not apply to changes made *within* a proceeding *before* a final order is issued, *cf.* 16 U.S.C. § 825*l*(a)–(b) (explaining the Commission's prerogative to modify its orders up until it files the agency record with the court of appeals).

Ratepayer Petitioners err in suggesting that the cost recovery proceeding was finalized with Opinion 554, and that the Commission's change-of-mind violates the *Fox Television* standard. *See* Br. 6, 23–24. In fact, PATH timely sought rehearing of that order,[3] which prompted a Commission response (Opinion 554-A), as well as a subsequent order responding to Petitioners' own request for rehearing[4] (Opinion 554-B). *See* 16 U.S.C. § 825*l*(a). Thus, until Opinion 554-B became the Commission's final say on the matter, it was free to amend its prior orders. *See id*.; *see also Granholm ex rel. Mich. Dep't of Nat. Res. v. FERC*, 180 F.3d 278, 281 (D.C. Cir. 1999) ("The [rehearing] requirement

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[3] "Request for Rehearing of [PATH]," FERC Dkt. Nos. ER09-1256, *et al*. (filed Feb. 21, 2017) ("PATH Rehearing Request"), R.351, JA370–444.

[4] *See* "Request for Rehearing of Keryn Newman, Pro Se and Alison Haverty, Pro Se," FERC Dkt. Nos. ER09-1256, *et al*. (filed Feb. 24, 2020) ("Ratepayer Petitioners Rehearing Request"), R.384, JA516–75.

also permits the agency an initial opportunity to correct its errors."). Indeed, an earlier order's findings are "beside the point" in light of a lawful subsequent order on rehearing. *See Murray Energy Corp. v. FERC*, 629 F.3d 231, 236 (D.C. Cir. 2011).

In any event, even if the *Fox Television* standard did apply, the Commission easily met it by thoroughly explaining its change in position from its initial determination in Opinion 554. *See, e.g.*, Op. 554-A, PP 80–86, 88, 98–101, JA506–08, 509–10, 513–14 (discussing Opinion 554 and explaining reversal); Op. 554-B, PP 19–23, 32, 36–42, JA584–87, 590, 592–94 (same).

A. Account 426.4's first clause specifies an exclusive list of covered items that does not include certificates of public convenience and necessity

Two of Account 426.4's three clauses are relevant to this appeal. The first covers "expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances … or approval, modification, or revocation of franchises." 18 C.F.R. pt.101, Account 426.4, A25. The second covers "expenditures … for the purpose of influencing the decisions of public officials." *Id*.

Beginning with the first clause, the Commission acknowledged that the Contractor expenses were directed at "influenc[ing] public opinion" in support of the PATH Project. Op. 554-A, P 79, JA505–06. But it found that the clause did not apply to the disputed expenses because none related to a specified item in that clause—e.g., the "approval, modification, or revocation of franchises." Op. 554-B, P 19, JA584.

The Commission previously arrived at the opposite conclusion. But it did so only by espying a catch-all category (indicated by the following italicization) absent from the actual text: "referenda, legislation, ordinances, the grant of franchise [sic] *and the like*." Op. 554, P 52, JA352–53 (emphasis added). Thus, although PATH's public opinion-related expenses targeted an item *not* listed in clause 1—to wit, securing certificates of public convenience and necessity—the Commission initially held that such Certificates were close enough to qualify anyway. *See id*.

That was error. By adding a category of activities not included in the Account, and describing what *was* included as merely "illustrative," Op. 554, P 52, JA352–53, Opinion 554 ran athwart the Account's text. *See* Op. 554-A, P 79, JA505–06; Op. 554-B, P 19, JA584. It also violated

basic precepts of regulatory construction. Because the listed items are not preceded by the modifiers "such as," "including," or "like," the negative implication canon, *expressio unius est exclusion alterius* (the expression of one thing is the exclusion of another), favors treating the list as exclusive, not representative. *See Original Honey Baked Ham Co. of Ga., Inc. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list."); *Matter of Newman*, 903 F.2d 1150, 1154 (7th Cir. 1990) (absence of qualifying words "creates a presumption that those [listed items] are the sole [items] covered"); Justice Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107–11 (2012); *see also* Op. 554-A, PP 76, 79, JA504–06 (concluding that PATH incurred public opinion-related costs "not contemplated in the text of Account 426.4"); PATH Rehearing Request at 48–49, JA427–28 (making this argument).

On appeal, Ratepayer Petitioners forfeit any argument that the listed items are *not* exclusive. While acknowledging the Commission's reversal on this point in Opinions 554-A and 554-B, they make no *argument* on the issue. *See* Br. 27; *Mo. River*, 918 F.3d at 960 (argument forfeited where petitioner "failed to fully develop it"); *Fox v. Gov't of D.C.*,

794 F.3d 25, 29 (D.C. Cir. 2015) ("[An] argument first appearing in a reply brief is forfeited."). Instead, they insist that the disputed expenses *do* fall under one of Account 426.4's listed items—"approval … of franchises." *See* Br. 28–29. Petitioners reason, confusingly, that a Certificate is a franchise based on an Iowa code definition of "franchise" that, itself, does not even mention the word "certificate," *compare* Br. Addendum at A-1 *with* Br. 28, and because a Certificate applicant might lobby public officials just as a franchise applicant would, Br. 28–29.

Ratepayer Petitioners' argument fails because it elides the regulation's actual text. While the intended scope of "franchise" in Account 426.4 is ambiguous, regulatory context, structure, and administrative precedent support the Commission's ultimate holding that Certificates do not qualify.

1. In Opinion 554-B, the Commission explained the commonly understood distinction between a franchise and a Certificate. A franchise confers a private privilege on a utility by permitting it to sell a product—e.g., electricity or natural gas. *See Trunkline Gas Co.*, 33 FERC ¶ 61,102, 61,220 (1985) ("a certificate of public convenience and

necessity" is *not* "a grant of an exclusive franchise to sell gas"); *Tenn. Gas Pipeline Co.*, 33 FERC ¶ 61,210, 61,436 (1985) (same); *see also* Op. 554-B, PP 19–20, JA584–85. A certificate of public convenience and necessity, by contrast, inherently reflects the *public* interest in a particular endeavor. *See* Op. 554-B, PP 19–20, JA584–85. Here, PATH did not compete for a franchise to secure "a potentially lucrative status for itself." *Id*. P 19, JA584. Instead, PJM ordered it to build a transmission line to satisfy a public need. *See id*.; Op. 554-A, P 1, JA468; Op. 554, PP 2–3, JA333–34.

Regulatory context supports this distinction.[5] Account 302 ("Franchises and consents"), refers to franchises and certificates as separate items. That provision covers "amounts paid … to a state … in consideration *for franchises*, consents, water power licenses, *or*

[5] This argument is properly asserted on appeal because it bolsters the Commission's rationale—rather than replaces an "otherwise invalid" one—of distinguishing "franchises" from "certificates." *See, e.g.*, *America's Cmty. Bankers v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) (court may consider an agency's interpretation of statutory language on appeal that reinforces an interpretation advanced in the administrative proceeding); Op. 554-A, P 79, JA505–06 (explaining that pursuing a certificate is not a "matter[] … contemplated in the text to Account 426.4").

certificates, … together with necessary and reasonable expenses incident to procuring such *franchises*, consents, water power licenses, *or certificates* of permission and approval ….” 18 C.F.R. pt.101, Account 302(A), A24 (emphasis added); *see also Stingray Pipeline Co.*, 36 FERC ¶ 61,412, 62,030 (1986) (recognizing that “costs associated with construction *certificate* filings” are properly recorded under Account 302(A) (emphasis added)). Account 302(A) punctuates the distinction by specifically identifying “certificates of permission and approval.” A certificate of public convenience and necessity, which is necessary to “permi[t]” operations, is exactly that.

“Words repeated in different parts of the same statute generally have the same meaning.” *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 60 (2014) (internal quotations omitted). Applying this principle to regulatory provisions, Account 302’s use of the term “franchise”—as distinct from “certificate”— is persuasive evidence of the term’s meaning in Account 426.4. A related principle holds that “when Congress includes particular language *in one section of a statute but omits it in another section of the same Act,* it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or

exclusion." *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008) (cleaned up) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)). Had the Commission intended to include Certificates in Account 426.4's list of covered items, it presumably would have done so explicitly—as evidenced by its intentional decision to list both "certificates" and "franchises" in Account 302. *See id*.

The Commission's orders have, for decades, recognized this distinction in the analogous natural gas pipeline context. In *Central Illinois Public Service Co.*, a natural gas company received franchises from two towns for the right to deliver gas to those towns. 35 F.P.C. 1061, 1062 (1966). It later received a certificate of public convenience and necessity from the Illinois Commerce Commission authorizing the service. *Id*.; *Algonquin Gas Transmission Co*., 56 FERC ¶ 61,013, 61,062 (1991) (substantially the same); *see also Trunkline Gas Co.*, 33 FERC ¶ 61,102, 61,220 (distinguishing a "certificate of public convenience and necessity" from a "franchise").

Ratepayer Petitioners observe that a footnote in Opinion 554-B for the first time states—albeit without authority—that PATH also needed to secure franchises in two of the three subject States. Br. 28; Op. 554-

B, P 19 n.44, JA584. But they err in suggesting this spoils the Commission's accounting determination. ***First***, neither the four decisions implicated here (the Initial Decision and Opinions 554, 554-A, and 554-B), nor an independent review of the record, reveals *any* activities related to franchise applications in West Virginia, Maryland, or Virginia. Instead, the record reflects only PATH's attempts to secure state certificates of public convenience and necessity. *See, e.g.*, Ex. PTH-1 at 17:16–18:8, 22:4–10, JA21–22, 26; Ex. PTH-6 at 1, JA32.

To be sure, record testimony acknowledges Maryland's specific law governing certificates of public convenience and necessity, which law requires a utility to first be franchised in the State. *See* Ex. JCA-96 at 9:10–10:2, JA271–72. But PATH's Maryland subsidiary, PATH-MD, did not seek a franchise there because it entered into a joint ownership agreement with an *existing* franchised utility, Potomac Edison. *See id*. at 9:22–10:2, JA271–72. Potomac Edison bought a stake in PATH-MD for this very purpose, and assumed responsibility for the Maryland leg of the Project, directing its design, construction, and operation. *See id*. (explaining that "[t]his structure and these arrangements" between PATH-MD and Potomac Edison "have been specifically designed to

comply with the Maryland [certificate of public convenience and necessity] statute as recently interpreted by the [Public Service] Commission [of Maryland] in Order No. 82892"). And regardless of whether the Maryland Commission ultimately blessed this arrangement, the relevant fact is the absence of evidence that PATH-MD pursued a franchise in the State. *See, e.g.*, Ex. PTH-1 at 17:16–18:8, 22:4–10, JA21–22, 26; Ex. PTH-6 at 1, JA32.

Second, even if Opinion 554-B *were* correct that PATH needed to secure a franchise in any of the three States, a review of the record provides no support for Ratepayer Petitioners' allusion that any of the disputed expenses relate to franchise applications. *See* Br. 28. Nor does Opinion 554-B suggest otherwise.

B. Account 426.4's second clause reasonably refers to activities that directly influence public officials' decisions

The second clause of Account 426.4 covers "expenditures … for the purpose of influencing the decisions of public officials." 18 C.F.R. pt.101, Account 426.4, A25. Opinion 554 somewhat inconsistently read this clause as covering activities that "*directly* influenc[e] public officials," while also declining to distinguish "expenses that influence public

opinion" from those that influence "the opinion of public officials." *Compare* Op. 554, P 51, JA352 (emphasis added), *with* Op. 554, P 53, JA353. In any event, Opinion 554 did not hold that the second clause applied to the disputed expenses. *See id*. P 53, JA353.

In its final assessment, the Commission held definitively that the second clause did not apply. It explained that the clause reasonably captures only those expenses involving direct influence of public officials' decisions. *See* Op. 554-B, P 21, JA585–86. And while the Contractor expenses directly targeted public *opinion*, they only *in*directly influenced public officials themselves. *See id*. PP 26–27, JA587–88. Ratepayer Petitioners counter that limiting the second clause to only those activities that directly influence officials' decisions reads into the Account a word, "directly," that does not exist, rendering the Commission's interpretation unreasonable. Br. 32.

Ratepayer Petitioners are incorrect. Far from supplanting the second clause's text, the Commission gave it a rational meaning, while also harmonizing it with the Account's first clause.

1. This Court's precedent is instructive. In interpreting the Commission's Federal Power Act authority "to assess the justness and

reasonableness of practices affecting rates of electric utilities," the Court deemed it unreasonable to interpret Congress' grant of authority as covering *all* "practices" that "*indirectly* or ultimately" "affect the rate." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (emphasis added) (citing 16 U.S.C. § 824e). The Court held that the Commission's "'affecting' jurisdiction" is, instead, limited "to rules or practices that '*directly* affect the [wholesale] rate.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 774 (quoting *California*, 372 F.3d at 403, and expressly adopting its test). Indeed, "a non-hyperliteral reading is needed to prevent the statute from assuming near-infinite breadth." *Id*. Far from altering the statute's text by adding the word "directly," the Court simply bounded its reach in a reasonable way.

California concerned a distinct statutory provision in the context of an agency's assertion of broad authority. The Commission had interpreted its "practices affecting rates" jurisdiction to include the power to reshape the governing board of a wholesale system operator. *California*, 372 F.3d at 398. The Court held that the statute could not reasonably bear such an attenuated link between a system operator's personnel and wholesale rates. *Id*. at 403.

Admittedly, Ratepayer Petitioners here draw a shorter line in tying activities geared at building public support for the PATH Project to influence of public officials' decisions. But that distinction is irrelevant. *California's* import is in showing that the Commission can—in fact, *must*—interpret its governing authorities with a dose of common sense: a "practice[] affecting rates" must mean a "practice[] *directly* affecting rates"—*even absent Congress' inclusion of the adverb*. And if the Commission must interpret a statutory provision to include the unwritten word "directly," then Petitioners plainly err in arguing it is categorically barred from doing the same in construing Account 426.4. *See* Br. 32. That is particularly true where, as here, the expert agency is interpreting its own regulations. *See Kisor*, 139 S. Ct. at 2417 (agencies enjoy broad discretion in interpreting ambiguous regulations within their zones of expertise).

2. The Commission's authority to reasonably bound the scope of Account 426.4 isn't just lawful in the abstract; it was reasonably applied here. Interpreting Account 426.4's second clause as capturing only those expenditures that *directly* "influenc[e] the decisions of public officials" imposes a common-sense limitation. *See* 18 C.F.R. pt.101,

Account 426.4, A25. Just as a "hyperliteral" reading in *California* led to absurd results, *see Elec. Power Supply Ass'n*, 136 S. Ct. at 774, so too could such an interpretation here snare every utility expense that happens to pre-date Certificate approval.

a. The preamble to Account 426.4, FERC Order 276, supports the Commission's interpretation. *See, e.g.*, *San Diego Gas & Elec. Co. v. FERC*, 913 F.3d 127, 137 (D.C. Cir. 2019) (reading the regulatory preamble together with the codified regulatory provisions to discern a regulation's meaning). Order 276 explains that the Commission opted to "exclud[e] from the text of Subaccount 426.4 the phrase 'or having any direct *or indirect* relationship to political matters, including the influencing of public opinion with respect to public policy.'" *Expenditures for Political Purposes — Amendment of Account 426*, *Other Income Deductions*, *Unif. Sys. of Accounts, & Report Forms Prescribed for Elec. Utils. & Licensees & Nat. Gas Companies — FPC Forms Nos. 1 & 2*, Order No. 276, 30 FPC 1539, 1540 (1963), A30 (emphasis added). Construing Account 426.4 as *not* including indirect influence of public officials' decisions is reasonable in light of the Commission's explicit choice to exclude a reference to indirect effects in the enacted text.

b. Further, the Commission's interpretation harmonizes the text of Account 426.4 by imbuing the first and second clauses with independent meaning. *See City of Roseville v. Norton*, 348 F.3d 1020, 1028 (D.C. Cir. 2003) (eschewing statutory interpretations that result in surplusage). An activity that influences public opinion "with respect to," for example, the adoption of new "referenda, legislation or ordinances" (clause 1), necessarily seeks as its ultimate goal to "influenc[e] the decisions of public officials" (clause 2). It is, after all, public officials who enact "referenda, legislation, or ordinances."

But interpreting the first clause together with the second, as the Commission originally did in Opinion 554 and as Ratepayer Petitioners urge here, renders the first clause superfluous. *See Roseville*, 348 F.3d at 1028; Op. 554, P 53, JA353 (rejecting a reading that treats Account 426.4's first and second clauses as distinct). If an expense can *in*directly "influenc[e] the decisions of public officials" by targeting public opinion, and thus qualify under the second clause, then the specified list of items in the first clause falls out of the Account. Unlike the first clause, the second includes no limitation on the universe of covered activities (e.g., securing "legislation" or a "franchise"). Thus, one could seek to influence

public opinion with respect to, as pertinent here, securing approval of a Certificate. That Certificates are not listed under the first clause would be no barrier, because the public relations activity would *in*directly influence decisionmakers under the *second* clause. The upshot is that *any* activity related to influencing public opinion would qualify under Account 426.4, regardless of whether that activity was directed at one of the first clause's listed items. *See also* PATH Rehearing Request at 50–51, JA429–30 (making this argument).

3. Finally, the Commission's reasonable interpretation of the second clause on rehearing dispenses with Ratepayer Petitioners' assertion of impermissible retroactive ratemaking. *See* Br. 53–57. Petitioners assume PATH's Formula Rate disallows recovery of the disputed expenses because the Rate does not include Account 426.4. From that premise, they reason that the Commission could have allowed recovery here only by changing PATH's Formula Rate through a "backdoor." *See* Br. 54–55. But this reasoning assumes the disputed expenses must be recorded to Account 426.4 in the first place. If they were instead properly assigned to Accounts 923 and 930.1 (which they were, *see infra* pp.57–61)—accounts that *are* included in PATH's

Formula Rate—then not even Petitioners dispute their recoverability. *See also* Op. 554-B, P 42, JA594 ("The rate on file has not been changed[.]").

C. The disputed expenses reasonably did not involve the direct influencing of public officials' decisions

The Contractor expenses comprise costs incurred by the Reliable Power Coalitions, Education Team, and the polling firm, R.L. Repass. *See* Op. 554-A, P 68, JA500; Initial Decision, P 20, JA310–11. Charles Ryan is a public relations and communications firm that was responsible for managing the three state Coalitions, as well as the Education Team, Ex. S-2 at 22–24, JA145–47; Ex. PTH-7 at 10:14–16, JA46; *see also* Op. 554-A, PP 67 n.162, 68, JA499–500. R.L. Repass, for its part, conducted public opinion polling. Op. 554-A, P 68, JA500.

The record contains substantial evidence that the Contractor expenses did not involve direct influencing of public officials' decisions. Ratepayer Petitioners' contrary argument assumes the wrong legal standard and is not compelled by the record evidence "taken as a whole." *See, e.g.*, *Bluestone*, 74 F.3d at 1294; *accord Friends of the River v. FERC*, 720 F.2d 93, 105 (D.C. Cir. 1983) (operative question is whether "[FERC's] decision [is] sustained by evidence in the record taken *as a*

whole" (emphasis added)). Indeed, their theory is infected with the administrative law judge's erroneous legal conclusion that because the "ultimate aim of the [disputed] expenditures was to influence the decisions of public officials," then—despite a lack of *direct* influence on public officials' decisions—they must be recorded to Account 426.4. *See* Initial Decision, P 32, JA316.

1. The administrative law judge proceeding established that PATH retained Charles Ryan to influence public opinion, specifically by "provid[ing] communications and public relations services relating to the siting and construction of the PATH Project" via the state Coalitions and Education Team. Op. 554, P 28, JA343–44 (citing Ex. PTH-7 at 10, JA46); Ex. S-2 at 22–24, JA145–47. The Coalitions—Marylanders for Reliable Power, Virginians for Reliable Energy, and West Virginians for Reliable Power—aimed "to inform the public about the need for energy infrastructure, including reliable transmission facilities, and conservation." Ex. PTH-7 at 9:13–17, JA45. Their membership comprised individuals, businesses, and civic groups. *Id*. at 9:15–16, JA45; Ex. S-4 at 4–5, JA157–59.

Charles Ryan also managed the Education Team. That organization similarly "educate[d] the public" about the Project by, among other things, marshaling the expertise of "third-party technical experts, environmentalists, and labor and business representatives from West Virginia, Maryland, and Virginia." Op. 554, P 28, JA343–44; Initial Decision, P 44, JA320.

Collectively, the Coalitions and Education Team sought to "educat[e] the public about the need for PATH," and facilitate "the filing of regulatory applications in all three [S]tates," by "creat[ing] a public climate that allow[ed] the regulatory review process to proceed in a fair and timely manner …." Ex. NH-9 at 1, JA59; *see also* Op. 554-A, P 68, JA500.

Critically, PATH did not retain Charles Ryan or R.L. Repass "to provide lobbying services." Ex. PTH-7 at 12:10–11, JA48. Those firms' activities "did not involve advocacy of legislation or specific governmental actions, and were not directed at members of state commissions charged with considering the merits of applications for authorization to construct the Project." *Id*. at 12:14–17, JA48.

PATH's relationships with Charles Ryan and R.L. Repass stand in stark contrast to its contract with another outside entity, Access Point. Unlike the indirect efforts of Charles Ryan and R.L. Repass to secure state Certificates, Access Point met directly with decisionmakers—namely, a local board of supervisors—to secure "official action" to modify conservation easements in Loudoun County, Virginia. *See* Ex. PTH-7 at 11:15–12:4, JA47–48; *see also* Op. 554-B, PP 21 n.47, 26, JA585, 587–88 ("PATH has agreed not to seek recovery for direct contact with decision-making officials, and did not seek rehearing on that issue with respect to the expenses for Access Point and Larry Puccio"[6]). Indeed, PATH retained Access Point for the express purpose of "assist[ing] [with] … lobbying and consulting matters." Ex. S-2 at 114, JA150. The Commission appropriately found that expenses incurred by Access Point must be recorded to Account 426.4—a finding that PATH did not challenge. *See* Op. 554-B, P 26, JA587–88.

2. Beyond the averred purposes of the Coalitions, Education Team, and R.L. Repass, the record contains substantial evidence that

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[6] PATH retained Larry Puccio "to conduct direct lobbying." *See* Op. 554-B, P 21 n.47, JA585.

the disputed Contractor expenses were, in fact, directed at building public support for the Project, and not at directly influencing public officials' decisions. *See id*. P 27, JA588; Op. 554-A, P 68, JA500. The various activities fall under the following categories:

- Working to recruit new members into the Coalitions, Ex. NH-25 at 19, 22, 45, 50, 80, JA68, 71, 85, 90, 106;
- Conducting outreach to property owners, labor groups, and the general public, *id*. at 22, 37–38, 50, 59, 108, JA71, 77–78, 90, 93, 118;
- Holding speaking engagements for the public and individual organizations to promote the Project, *id*. at 19, 44, 70, 91, 109, JA68, 84, 100, 113, 119;
- Recruiting individual members to speak at public forums, write letters to the editor and state commissioners, and draft opinion pieces for publication, Ex. NH-38 at 6, JA126; Ex. NH-25 at 32–33, 38, 42, 45, 48–49, 59, 65, 71, 76, 88, 91, 108, 114–15, JA72–73, 78, 82, 85, 88–89, 93, 98, 101, 104, 112–13, 118, 120–21;
- Gathering signatures for petitions, Ex. NH-25 at 34, 46, JA74, 86;
- Holding press conferences and conducting other media outreach, *id*. at 51, 61, 81, JA91, 94, 107; and
- Conducting public opinion polling, *id*. at 21, JA70; Ex. NH-50 at 1–4, JA131–34.

These activities reflect PATH's work to promote the Project with the public, and none indicate direct influencing of public officials'

decisions by the Coalitions, Education Team, or R.L. Repass. *See* Op. 554-A, PP 79, 85, JA505–06, 508; Op. 554-B, P 27, JA588. To the extent these activities *did* involve direct contact with decisionmakers—e.g., via state public utility commission hearings or writing letters to state commissioners—those contacts were made by individual members of the Coalitions, not PATH's public relations contractors. *See, e.g.*, Ex. NH-25 at 32, JA72 ("Approx 20 members" of the "[Maryland] Coalition" "will send letters to [public utilities commission] in support of PATH"), 38, JA78 ("[Virginia] [C]oalition working to recruit speakers for the public hearing"), 42, JA82 (under "[Education Team]/Coalition Update": "Set up calls … to identify speakers for the public hearings"), 59, JA93 (under "Hired [Charles Ryan] to handle [C]oalition public outreach": "Looking for [Maryland] participants to take part in public forums"); *see also* Op. 554-B, P 27, JA588 (noting that the record reflects efforts to "find[] private citizens … to meet with an elected official," rather than direct meetings between public officials and PATH's contractors).

In other words, the work of the Coalitions and Education Team—and the related expenses—involved recruiting individuals to advocate

for the PATH Project. Such endeavors amount to influencing public opinion, à la Account 426.4's first clause. *See* Op. 554-B, P 26, JA587–88. But the record reflects that any subsequent contacts with decisionmakers were executed by those individuals independently, which is one step removed from the Coalitions and Education Team and, thus, from the disputed expenses. *See* Op. 554-B, P 27, JA588.

3. Three discrete record entries warrant closer scrutiny. ***First***, under "[Education Team]/Coalition Update," a June 2009 meeting minute reflects a future "[m]eeting with [Virginia] Governor Kaine to discuss project update." Ex. NH-25 at 38, JA78; *see also* Op. 554-B, P 27, JA588. But it is unclear whether the meeting involved private individuals recruited by the Education Team and Virginia Coalition, or whether it included PATH's contractor, Charles Ryan, itself. Against a raft of record evidence that similar activities involved individuals in their own capacity—e.g., individuals recruited *by* the Coalitions—the Commission reasonably inferred the same with regard to this entry. *Cf.* Op. 554-B, P 27, JA588 (construing the record as a whole); *see also Bluestone*, 74 F.3d at 1294 (court considers "record as a whole").

Further, the record does not indicate that the purpose of the Virginia Governor meeting was to lobby for an official decision on PATH's Certificate application, as opposed to keeping the Governor informed of the Project's status. The minutes reflect only that the meeting involved discussions about "the low turnout at the [Virginia] public hearings." Ex. NH-25 at 40, JA80.

Second, minutes from a March 2009 meeting include a "Coalition update[]" involving distribution of "fact sheets to [West Virginia] legislators." Ex. NH-25 at 58, JA92; *see also* Op. 554-A, P 68, JA500. But the record supports the Commission's conclusion that this, too, evinces only an "indirect form[] of influencing officials" by individual members of the Coalition, not by Charles Ryan employees. *See* Op. 554-B, P 27, JA588. Further, a "fact sheet" does not necessarily evince political lobbying urging a particular decision. *See* Op. 554-A, P 85, JA508 (distinguishing "public education and outreach expenses" from direct lobbying).

Third, a February 2011 meeting minute notes that "representatives" from the West Virginia Coalition met with that State's Governor and his chief of staff, during which "[t]he group explained that

[the Coalition] is an organization working to educate the public on the need and benefits of transmission infrastructure." Ex. NH-25 at 91, JA113. But, as with the other contacts between the Coalitions and public officials, there is no indication that Charles Ryan—rather than individual Coalition members—was involved. *See* Op. 554-B, P 27, JA588. Nor do the meeting minutes indicate that the purpose of the meeting was political lobbying, rather than informational outreach. *See* Op. 554-A, P 85, JA508.

4. Even if the Court found that these three particular expenses implicated Account 426.4's second clause, that would not warrant a remand. As a first matter, Ratepayer Petitioners raise none of them in their brief as evidence that the disputed expenses must be recorded to Account 426.4, and so any argument regarding them is forfeited. *See Mo. River*, 918 F.3d at 960; *Gov't of D.C.*, 794 F.3d at 29. But even on the merits, the Court's inquiry is not *de novo*; it is limited to assessing whether the Commission's "factual findings … are unsupported by substantial evidence on the record *as a whole*." *Bluestone*, 74 F.3d at 1294 (emphasis added); *accord Friends of the River*, 720 F.2d at 105. The Court's task is "only to search for *substantial evidence*, not proof

positive." *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1495 (D.C. Cir. 1986).

Thus, in *Murray Energy*, this Court upheld the Commission's certification of a pipeline against concerns it would cause a coal mine explosion—despite contrary evidence in the record. 629 F.3d at 237–38. The Court explained that, "[a]lthough … some of the experts' statements contradict discrete elements of FERC's position, *on the whole* their reports support FERC's conclusion." *Id*. at 237 (emphasis added).

Same here. While none of the Contractor expenses at issue "contradict" the Commission's position *at all*, to the extent the Court finds otherwise, that still would not disqualify the Commission's ultimate conclusion. "[The Commission's] decision does not lack substantial evidence simply because [a] petitioner[] offer[s] 'some contradictory evidence.'" *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954–55 (D.C. Cir. 2005) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003)). And because substantial record evidence supports the Commission's finding that the disputed expenses only *in*directly aimed at influencing public officials' decisions, the

Commission reasonably found that those costs do not qualify under Account 426.4's second clause.

D. Permitting recovery of the disputed expenses is consistent with Commission policy and precedent

Ratepayer Petitioners argue that the Commission's determination violates FERC Order 276, which established Account 426.4, as well as the Commission's prior policy and precedent disallowing recovery of lobbying expenses. *See* Br. 25–27. Neither contention has merit.

1. FERC Order 276, the preamble to Account 426.4, explains that whether that Account applies to a particular expense is determined on a case-by-case basis, in light of each matter's "specific fact situation[]." Order 276 at 1541–42, A31. Order 276 expressly rejects a bright line distinction between expenses that qualify for Account 426.4 and those that do not. *See id*. ("an exhaustive list of items that normally should be placed in Subaccount 426.4 … would be impractical"); *see also* Op. 554-A, P 86, JA508. It instead offers two illustrative lists of "the type of expenditures that it would appear" should be recorded to Account 426.4, as opposed to those that should be recorded as operating expenses. Order 276 at 1542, A31.

Ratepayer Petitioners quote one of the listed entries in support: "[p]ayments for lobbying … for influencing the passage or defeat of pending legislative proposals or influencing official decisions of public officers." Br. 26 (quoting *id.*, A32). But that entry merely parrots the regulatory text. It does nothing to impair the Commission's conclusion that Account 426.4's second clause is limited to activities that *directly* influence public officials' decisions. *See supra* pp.31–36.

The upshot is that Order 276 and Account 426.4 are at best ambiguous on "where to draw the line between 'political' [expenses]"—i.e., those recorded to Account 426.4—"and operating expenses." Op. 554-A, P 86, JA508.

2. Nor do Ratepayer Petitioners' three cited Commission orders (at Br. 26–27) offer an assist. They invoke *ISO New England* for the proposition that public relations activities "'to develop public and legislative support for a utility's proposal should be recorded to Account 426.4.'" Br. 27 (quoting *ISO New England*, 117 FERC ¶ 61,070, P 45). But *ISO New England* did not interpret Account 426.4; it merely referenced a *prior* decision that itself offered only "limited guidance" on

that Account's scope. *See ISO New England*, 117 FERC ¶ 61,070, P 45 & n.62, *aff'd*, *Braintree*, 550 F.3d 6.

In fact, the order referenced by *ISO New England*, *Alaskan Northwest Natural Gas Transportation Co.*, (also cited by Petitioners, at Br. 26), immediately distinguishes the instant matter. There, the Commission held that expenses aimed at "develop[ing] public and legislative support" for various bills—e.g., a financial plan, the Natural Gas Policy Act of 1978, and an Alaska lands bill—should be recorded to Account 426.4. *See* 19 FERC ¶ 61,218, 61,427 (1982) ("Order on Show Cause Order"); *Alaskan Nw. Nat. Gas Transp. Co.*, 13 FERC ¶ 61,213, 61,481–82 (1980) ("Order to Show Cause"). That makes sense. Such expenses reasonably fall under clause 1 of Account 426.4, which expressly covers "expenditures for the purpose of influencing public opinion with respect to," among other things, "*legislation*." 18 C.F.R. pt.101, Account 426.4, A25 (emphasis added). Here, by contrast, expenses related to influencing public opinion are unassociated with "legislation" or another item listed under clause 1. *See supra* pp.22–28.

Nor does *Northwest Alaskan Pipeline Co.* help Petitioners (at Br. 26). *See* 15 FERC ¶ 61,116, 61,274 (1981). There, the Commission

required expenses related to a "booklet and press kit" to be recorded to Account 426.4 because they were "intended and used to influence public opinion and the opinion of public officials during the selection process of the [pipeline] project." *Id*. But *Northwest Alaskan* failed to explain *how* those materials "influenc[ed] … the opinion of public officials"—i.e., whether the influence was direct or indirect (clause 2 of Account 426.4)—or whether they sought to "influenc[e] public opinion" on a listed item (clause 1). *See* 18 C.F.R. pt.101, Account 426.4, A25. Thus, it is uncertain whether PATH is similarly situated to the entity there, meaning the Commission could not have unlawfully departed from *that* precedent in the orders on review. *See Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279, 283 (D.C. Cir. 2020) (an agency might depart from its precedent *if* the entities in both cases are "similarly situated"); *see also ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024–25 (D.C. Cir. 2018) (requiring explanation for disparate treatment of two "virtually indistinguishable" entities).

3. What's more, there is good reason to find that Petitioners' cited authorities—Order 276 and the constellation of orders discussed above—do not compel assigning the disputed Contractor expenses to

Account 426.4: a contrary outcome conflicts with the Commission's long-standing policy on cost recovery. As this Court has explained, that policy—not an expense's assignment to Account 426.4—typically determines a cost's eligibility for recovery from ratepayers. *See Braintree*, 550 F.3d at 11–12 (upholding the Commission's decision in *ISO New England* ***not*** to decide whether certain expenses must be recorded to Account 426.4 because they were, in any event, recoverable under the Commission's cost recovery policy).

Agency and judicial precedent interpreting that policy support recovery of the disputed expenses. In *ISO New England*, the Commission explained that the operative question for cost recovery purposes is not whether an expense is political *per se*, but whether it furthers "legitimate [system operator] objectives." *See* 117 FERC ¶ 61,070, PP 40, 48–50. So in that proceeding, the Commission allowed recovery of expenses for "external affairs" and "corporate communications," even though such activities constituted a form of "lobbying." *Braintree*, 550 F.3d at 9–11. The expenses even involved supporting "specific legislation or ideas on which there was pending legislation," and "communicat[ing] with state and federal legislators."

ISO New England, 117 FERC ¶ 61,070, P 49. The Commission distinguished these recoverable, public-facing lobbying expenses from those untethered to ratepayer interests—e.g., "'participation in Political Action Committees, candidate fundraising, [and] entertainment expenses.'" *Braintree*, 550 F.3d at 10 (quoting *ISO New England*, 117 FERC ¶ 61,070, P 41).

The Contractor expenses here reasonably fall on the recoverable side of *ISO New England*'s dividing line. Because a system operator (PJM) ordered the PATH Project built to ensure grid reliability, costs incurred to that end—including to marshal public support—are "in furtherance of legitimate [system operator] objectives." *See* Op. 554-B, P 19, JA584; Op. 554, PP 2–3, JA333–34; *see also Advanced Energy Mgmt.*, 860 F.3d at 659; 18 C.F.R. § 35.34(a); *supra* p.19. Indeed, they are "directly related to … future operations" deemed to be in the ratepayers' interest. *See ISO New England*, 117 FERC ¶ 61,070, P 50; *see also* Op. 554-B, P 19, JA584.

4. Ratepayer Petitioners suggest that the Commission unlawfully removed expenses from Account 426.4 to guarantee their recovery under the Commission's cost recovery policy, notwithstanding Account

426.4's text. *See* Br. 53–54. Petitioners seize on the Commission's statement that "recoverability, not the question of accounting determinations, [is] controlling." *Id*. (quoting Op. 554-B, P 23, JA586–87). To reiterate, PATH's Formula Rate does not include Account 426.4. *See* Op. 554, P 49, JA351–52; Op. 554-A, P 13, JA472–73. So if the disputed Contractor expenses must be recorded to that Account, then they *cannot* be passed through to ratepayers—irrespective of their recoverability under the Commission's cost recovery policy. *Cf. Braintree*, 550 F.3d at 11–12.

Petitioners' concern goes nowhere because the Commission did, in fact, reasonably construe Account 426.4 and found that, under its interpretation, the Account did not apply to the Contractor expenses. *See supra* pp.22–47. Further, the chosen quote is divorced from its context. Read in full, the Commission explained that because PATH's Contractor expenses *are* recoverable under its cost recovery policy, it would not impose Account 426.4 where the Account "does not *clearly* apply to the expenditure." Op. 554-B, P 23, JA586–87 (emphasis added).

That is an eminently reasonable approach. *Cf. Kisor*, 139 S. Ct. at 2417–18 (a regulatory interpretation may be entitled to deference if it

"implicate[s] [the agency's] policy expertise" and is consistent with prior decisions). Far from subordinating Account 426.4 *to* its cost recovery policy, the Commission simply interpreted Account 426.4 in a reasonable way that conforms *with* that policy.

* * *

The Commission's construction of Account 426.4 appropriately reflects the "text, structure, history, and purpose of [the] regulation." *Kisor*, 139 S. Ct. at 2415. Should the Court determine, as the Commission did, that the Account is ambiguous, it should grant the Commission's interpretation deference because it falls within the regulation's "bounds of permissible interpretation," implicates the Commission's "substantive expertise" in deciding matters of cost recovery, and reflects its "fair and considered judgment." *See id*. at 2415–18; *see also S.C. Pub. Serv. Comm'n v. FERC*, 762 F.3d 41, 54–55 (D.C. Cir. 2014) ("[I]n rate-related matters, the Court's review of the Commission's determinations is particularly deferential because such matters are either fairly technical or involve policy judgments that lie at the core of the regulatory mission." (internal quotations omitted)).

III. The Commission reasonably found that the disputed expenses qualify for Account 923

PATH recorded most of its Contractor expenses to Account 923. Op. 554-A, P 69, JA501. Account 923 ("Outside Services Employed"), broadly covers "the fees and expenses of professional consultants and others for general services which are not applicable to a particular operating function or to other accounts." 18 C.F.R. pt.101, Account 923(A), A26. Unlike Account 426.4, Account 923 is included in PATH's Formula Rate. *See* Initial Decision, P 19, JA310. Thus, if the expenses are properly recorded there, PATH may recover them in its rates.

The Commission initially found that the disputed expenses were not properly recorded to Account 923, but did so based only on its conclusion that the expenses must be assigned to Account 426.4. *See* Op. 554, PP 25–28, 48–55, JA342–44, 351–54. On rehearing, having determined that Account 426.4 does not cover the expenses, the Commission explained why they *do* qualify under Account 923. The Account is broad in scope, covering costs paid to "professional consultants and others for general services," as well as, for example, "accountants and auditors, actuaries, appraisers, attorneys, engineering consultants, management consultants, negotiators, public relations

counsel, tax consultants, *etc*." 18 C.F.R. pt.101, Account 923(A) & Item 1, A26 (emphasis added); *see also* Op. 554-A, P 80, JA506.

Charles Ryan and R.L. Repass easily qualify. They were hired to consult on public relations matters in support of the PATH Project. *See* Ex. PTH-7 at 12:10–14, JA48; *see also* Op. 554-A, P 82, JA507. At the very least, they are "others" retained for "general services." *See* 18 C.F.R. pt.101, Account 923(A), A26.

Ratepayer Petitioners disagree. They argue that allowing the disputed expenses to be assigned to Account 923, rather than to Account 426.4, sets a precedent for "backdoor … recovery" of lobbying costs in violation of the Commission's cost recovery policy. Br. 35. Because Account 923 covers outside consultants, Petitioners reason that a utility could make an end-run around Account 426.4 by simply outsourcing its lobbying work to contractors. *Id*.

Ratepayer Petitioners did not raise this argument in their rehearing request, meaning it is waived. *See* Ratepayer Petitioners Rehearing Request at 22, JA543; *New England Power Generators Ass'n, Inc. v. FERC*, 879 F.3d 1192, 1198 (D.C. Cir. 2018) (citing 16 U.S.C. § 825*l*(b)) ("[T]he party seeking judicial review must have raised in its

rehearing request before the Commission each objection it puts down before the reviewing court.").

The argument fails in any event. Ratepayer Petitioners assume that the Contractor expenses would qualify for Account 426.4 if they were not incurred by outside consultants, and thus recorded to Account 923. Br. 35. But, as discussed, *supra* pp.22–47, the Commission reasonably found that the expenses are *not* properly recorded to Account 426.4. Expenses not eligible for Account 426.4 in the first place do not evade it by way of a utility's decision to outsource the relevant activities.

IV. The Commission reasonably found that the disputed expenses qualify for Account 930.1

PATH recorded some of the disputed costs—approximately $2.6 million, billed principally by Charles Ryan—to Account 930.1 ("General Advertising Expenses"). 18 C.F.R. pt.101, Account 930.1(A), A27; Op. 554, P 58, JA355. Account 930.1 "shall include … expenses incurred in advertising and related activities," but it excludes certain advertising costs "of a political nature" that are otherwise eligible for recording under Account 426.4. 18 C.F.R. pt.101, Account 930.1(A) & Note B, A27.

Most of PATH's Account 930.1 expenses were incurred by Charles Ryan to build public support for the Project. *See* Op. 554, P 58, JA355.

As with the expenses recorded to Account 923, the Commission initially rejected PATH's cost-apportionment to Account 930.1 because it found that those amounts were properly recorded to Account 426.4. Op. 554, P 62, JA356–57. Because PATH did not distinguish advertising aimed at securing Certificate approval (sums Opinion 554 found must be recorded to Account 426.4) from what Opinion 554 deemed to be non-political advertising, the Commission decided that *all* of PATH's advertising expenses must be recorded to Account 426.4. *Id*.

The Commission also initially found non-recovery compelled by PATH's Formula Rate. It reasoned that the Formula Rate only allows for recovery of Account 930.1 expenses that are "safety related." *Id*. P 64, JA357. Because none of PATH's expenses were safety-related, the Commission initially deemed them non-recoverable on this alternative basis. *See id*.

The Commission reversed on rehearing. It concluded (1) that the disputed expenses were properly recorded to Account 930.1 as outreach-related advertising; and (2) that they are recoverable under PATH's

Formula Rate. Op. 554-B, PP 37–40, JA592–94. The Commission's ultimate conclusion reflects a reasonable interpretation of Account 930.1's text and PATH's Formula Rate, and is supported by substantial evidence in the record.

A. Note B to Account 930.1 does not require allocating PATH's advertising expenses to Account 426.4

Note B to Account 930.1 requires a utility to "[e]xclude from this account and include in [A]ccount 426.4 … expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature." 18 C.F.R. pt.101, Account 930.1, Note B, A27. At first glance, Note B's broad wording suggests that such expenses must be assigned to Account 426.4, regardless of whether they fall within the more limited scope of Account 426.4 itself. Indeed, Note B contains none of Account 426.4's caveats—e.g., limiting the types of eligible public opinion-related activities to "approval, modification, or revocation of franchises." 18 C.F.R. pt.101, Account 426.4, A25; *see also supra* p.22.

The Commission reasonably found, however, that a Note appended to one account (930.1) does not *sub silentio* expand the scope of another account (426.4). Op. 554-B, P 40, JA594. Instead, Note B's reference to

advertising directed at "solicit[ing] public support or the support of public officials" must be read within—not without—the context of activities covered by the plain text of Account 426.4. *See id*. A contrary interpretation would effectively amend Account 426.4, which the Commission cannot do without following the Administrative Procedure Act's rulemaking procedures. *See Kisor*, 139 S. Ct. at 2434 (Gorsuch, J., concurring) (Section 553 of the Act, 5 U.S.C. § 553, "requires agencies to follow notice-and-comment procedures when issuing *or amending* legally binding regulations" (emphasis added)); *see also Fox Television*, 556 U.S. at 515 (an agency must "display awareness" that it is amending an old rule; it may not "depart from a prior policy *sub silentio*").

Ratepayer Petitioners insist, however, that FERC Order 276—the preamble to Account 426.4—compels parking PATH's advertising expenses in that Account. Br. 38. Order 276 lists "'[a]dvertising in various mass communication media to influence the general public or public officials on the private v. public power question,'" as an example of—in the words of the preamble—a "type of expenditure[] that it would appear should be placed in [that Account]." *Id*. (quoting Order 276 at 1542, A31–32). But just as Account 930.1 cannot covertly amend

Account 426.4, neither can a regulatory preamble—particularly one written in such equivocal terms. *See Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) ("[T]he preamble of a regulation is not controlling over the language of the regulation itself." (internal quotations omitted)). And, in any event, the quoted example reasonably does not apply: it is unclear what "mass communication media" means, and PATH's attempt to secure Certificates has nothing to do with the "private v. public power question"—a term that itself is vague and undefined.

The inevitable result is that Account 426.4's inapplicability to the disputed expenses is conclusive evidence that Note B does not mandate—let alone allow—diverting expenses otherwise properly recorded under Account 930.1 to Account 426.4.

B. PATH's Formula Rate includes recovery for outreach-related advertising expenses

PATH's Formula Rate incorporates only part of Account 930.1 by limiting recoverability to certain types of advertising. *See* Op. 554-A, P 100, JA513–14; Op. 554-B, P 36, JA592; *see also* Op. 554, P 63, JA357. Thus, while PATH properly recorded the disputed advertising expenses to Account 930.1, the question remains whether it could recover them

under its Formula Rate. While the Formula Rate is itself unclear on the issue, the Commission reasonably found that it permits recovery of the Contractor expenses.

A table to Attachment 4 ("Cost Support") of the Formula Rate is the source of the opacity. That table has an ambiguous heading: "Safety Related Advertising, Education and Out Reach [sic] Cost Support." Op. 554-B, P 31, JA589. The Commission originally held that "Safety Related" modifies not just "Advertising," but also "Education and Out Reach," meaning only those safety-related costs incurred by Charles Ryan and R.L. Repass—of which PATH showed none—could qualify for recovery. Op. 554, PP 64, 66, JA357–58. Ratepayer Petitioners agree. Br. 41–42.

The Commission's original conclusion was, however, not the best one because—as the Commission explained on rehearing—it ignored conflicting evidence and rendered certain Formula Rate provisions a nullity.

1. Opinion 554 failed to appreciate that the Attachment 4 heading is reasonably superseded by more specific text, as reflected in this image:

Attachment 4 - Cost Support

PATH West Virginia Transmission Company, LLC

Safety Related Advertising, Education and Out Reach Cost Support

	Attachment A Line #s, Descriptions, Notes, Form 1 Page #s and Instructions		Form 1 Amount	Safety, Education, Siting & Outreach Related	Other	Details
	Directly Assigned A&G					
157	General Advertising Exp Account 930.1	p323.191.b	-	-	-	None

Source: Op. 554-B, P 31, JA590.

Column 1 of the featured table lists the relevant expense account: "General Advertising Exp Account 930.1." And Column 2 includes three sub-columns for inputting the expense itself. As relevant here, one of those sub-columns is titled "Safety, Education, Siting & Outreach Related." Notably, "Safety" does not modify "Education, Siting, and Outreach." It signifies its own class of advertising expenses properly recoverable under the Formula Rate. Thus, the table's heading aside, an expense is recoverable under the Formula Rate if it is related to safety, education, siting, *or* outreach.

The Commission reasonably elevated the plain text of the sub-column over the ambiguous text of the table heading. *See* Op. 554-A, P 100, JA513–14; Op. 554-B, PP 32, 37, JA590, 592–97. As this Court has recognized in the analogous context of statutory construction, "[s]ection headings … 'cannot substitute for the operative text ….'" *Make the Rd. New York v. Wolf*, 962 F.3d 612, 627 n.8 (D.C. Cir. 2020)

(quoting *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008)). The corollary principle that a specific provision (the sub-column) prevails over a more general one (the table heading) drives the same conclusion. *See* Op. 554-A, P 100, JA513–14; Op. 554-B, PP 32, 37, JA590, 592–97. *Cf. Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1127 (D.C. Cir. 2013) ("The principle that a specific statutory provision prevails over a more general provision is established beyond question." (internal quotations omitted)).

2. The Commission's interpretation also harmonizes the Tariff's broader structure. *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703 (D.C. Cir. 2010) (court reads a tariff as a whole, not one provision in isolation). The Administrative and General Account ("A&G") of the Formula Rate provides that the amount of recoverable A&G is reduced by "EPRI & Reg. Comm. Exp. & Other Ad.," and references Note D for calculating the reduction. Op. 554-B, P 31, JA589–90 (internal quotations omitted). Note D, in turn, states—inelegantly—that "EPRI Annual Membership Dues listed in Form 1 at 353.f, all Regulatory Commission Expenses itemized at 351.h, *except safety, education and out-reach related advertising included in Account 930.1*." *Id*. P 37,

JA592–93 (internal quotations omitted). Thus, in plain English, because recoverable A&G is reduced by those expenses listed in Note D *except* safety, education and outreach-related advertising expenses, Note D *permits* recovery of those expenses. *Id*.

Further, Note D maps cleanly onto the text of Attachment 4's sub-column titled "Safety, Education, Siting & Outreach Related." *See id*. Ratepayer Petitioners' contrary interpretation, which focuses solely on the ambiguous Attachment 4 table heading, effectively nullifies Note D by excluding from recovery expenses that Note D expressly designates *for* recovery.

Because the Commission's determination rationalizes PATH's various Tariff provisions in a reasonable way, its conclusion deserves deference. *See Marcus Hook*, 430 F.3d at 446–47 (courts "generally give substantial deference to FERC's interpretation of filed tariffs" (internal quotations omitted) (cleaned up)).

C. The disputed advertising expenses are reasonably classified as outreach-related

Ratepayer Petitioners rejoin that, even if PATH's Formula Rate *does* allow recovery of non-safety-related education and outreach advertising, the Commission failed to explain how the disputed

Contractor expenses qualify. Br. 43–45. Petitioners accuse the Commission of classifying all advertising as "outreach" advertising. Br. 44.

Not so. In fact, substantial evidence shows that the disputed expenses *are* "outreach-related." The Commission explained that expenses billed by Charles Ryan were part of a "public outreach plan for an approved project." Op. 554-A, P 81, JA506–07. As discussed, *supra* pp.38–39, Charles Ryan was hired to "[p]roactively communicate project benefits …, [s]olicit[] third party endorsements …, [m]itigate[] opposition by community officials,' and assist[] with 'Government Relations.'" *Id*. (emphasis added) (quoting Ex. S-2 at 19–21, JA142–44).

Witness testimony supports this conclusion. Mark Williamson, who has consulted on other electric infrastructure projects, explained that the Charles Ryan expenses reflect typical outreach efforts to "provid[e] information about the projects' benefits to members of the public … and to encourage individuals and groups to recognize the need for the project to make regulators aware of their views." Ex. PTH-79 at 1:3–11, 8:15–17, JA189, 196. PATH's attempts at "'educating … the public with factual information about … the reliability benefits' of the

[P]roject" were, as Mr. Williamson put it, like "a professor 'providing [] information in order to persuade students that the theory of evolution is correct.'" Op. 554-A, P 97, JA512–13 (quoting Ex. PTH-79 at 19:2–13, JA207); *see also id*. P 101, JA514 (explaining that the disputed "costs qualify as outreach and are therefore recoverable"); *id*. PP 81, 85, JA506–08.

Finally, Ratepayer Petitioners' concern that the Commission's decision means that *any* advertising could be deemed "outreach-related" advertising proves too much. Br. 44–45. Whether advertising is characterized as outreach, education, or something else, its purpose is inherently to persuade. The distinction between educational and outreach advertising on the one hand (recovery allowed under PATH's Formula Rate), and other types of advertising (recovery forbade), must therefore turn on the *purpose* of the persuasion. *Cf.* Op. 554-A, P 79, JA505–06 ("'the "intended use" and the "reason behind" the payment dictates its accounting assignment'" (quoting Initial Decision, P 40, JA318–19)).

PATH's brand of advertising had, as its purpose, persuading the public that a PJM-ordered transmission line was in the public interest.

That is clearly distinguishable from other types of advertising whose sole purpose is private pecuniary gain—for example, marketing a promotional rate for electricity or promoting the PATH Project over a competing proposal. And nothing in the Commission's orders suggests this latter type of advertising, which inures to the benefit of a utility's stockholders rather than also serving the public interest, would qualify as "outreach-related." Quite the opposite. As the Commission explained, "education and outreach expenditures designed to help secure approval for a[] [PJM]-approved project are recoverable expenses that *benefit ratepayers by ensuring reliable electric service*." Op. 554-B, P 38, JA593 (emphasis added)).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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March 26, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), because this brief contains 12,538 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in New Century Schoolbook 14-point font using Microsoft Word 365.

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March 26, 2021

CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE COURT'S RULES

In the United States Court of Appeals for the District of Columbia Circuit

No. 20-1324

KERYN NEWMAN AND ALISON HAVERTY,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW
OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

ADDENDUM TO BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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COMMISSION
WASHINGTON, D.C. 20426

March 26, 2021

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out below] shall take effect 180 days after the date of its enactment [Sept. 13, 1976].

''(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment [Sept. 13, 1976].''

SHORT TITLE OF 1976 AMENDMENT

Pub. L. 94–409, §1, Sept. 13, 1976, 90 Stat. 1241, provided: ''That this Act [enacting this section, amending sections 551, 552, 556, and 557 of this title, section 10 of Pub. L. 92–463, set out in the Appendix to this title, and section 410 of Title 39, and enacting provisions set out as notes under this section] may be cited as the 'Government in the Sunshine Act'.''

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103–7 (in which the report required by subsec. (j) of this section is listed on page 151), see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104–52, set out as a note preceding section 591 of this title.

DECLARATION OF POLICY AND STATEMENT OF PURPOSE

Pub. L. 94–409, §2, Sept. 13, 1976, 90 Stat. 1241, provided that: ''It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act [see Short Title note set out above] to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.''

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, §4, 60 Stat. 238.

In subsection (a)(1), the words ''or naval'' are omitted as included in ''military''.

In subsection (b), the word ''when'' is substituted for ''in any situation in which''.

In subsection (c), the words ''for oral presentation'' are substituted for ''to present the same orally in any manner''. The words ''sections 556 and 557 of this title apply instead of this subsection'' are substituted for ''the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection''.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof,

that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same

§ 824c. Issuance of securities; assumption of liabilities

(a) Authorization by Commission

No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The provisions of this section shall be effective six months after August 26, 1935.

(b) Application approval or modification; supplemental orders

The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

No public utility shall, without the consent of the Commission, apply any security or any proceeds thereof to any purpose not specified in the Commission's order, or supplemental order, or to any purpose in excess of the amount allowed for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(g) Inaction of Commissioners

(1) In general

With respect to a change described in subsection (d), if the Commission permits the 60-

day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum—

(A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and

(B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

(2) Appeal

If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142; Pub. L. 115–270, title III, § 3006, Oct. 23, 2018, 132 Stat. 3868.)

AMENDMENTS

2018—Subsec. (g). Pub. L. 115–270 added subsec. (g).

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order re-

funds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

[1] See References in Text note below.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Pub. L. 100–473, § 3, Oct. 6, 1988, 102 Stat. 2300, provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Pub. L. 100–473, § 5, Oct. 6, 1988, 102 Stat. 2301, directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and

Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

(June 10, 1920, ch. 285, pt. III, §311, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, §312, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided

in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

§ 35.33 Specific provisions.

(a) In addition to the general provisions of § 35.32, the Trustee must observe the provisions of this section.

(b) The Trustee may use Fund assets only to:

(1) Satisfy the liability of a utility for decommissioning costs of the nuclear power plant to which the Fund relates as provided by § 35.32; and

(2) Pay administrative costs and other incidental expenses, including taxes, of the Fund as provided by § 35.32.

(c) To the extent that the Trustee does not currently require the assets of the Fund for the purposes described in paragraphs (b)(1) and (b)(2) of this section, the Investment Manager, when investing Fund assets, must exercise the same standard of care that a reasonable person would exercise in the same circumstances. In this context, a ''reasonable person'' means a prudent investor as described in Restatement of the Law (Third), Trusts § 227, including general comments and reporter's notes, pages 8–101. St. Paul, MN: American Law Institute Publishers, 1992. ISBN 0–314–84246–2. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and are also available in local law libraries. Copies may be inspected at the Federal Energy Regulatory Commission, 888 First Street, NE. Washington, DC or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

(d) The utility must submit to the Commission by March 31 of each year, one original and three conformed copies of the financial report furnished to the utility by the Fund's Trustee that shows for the previous calendar year:

(1) Fund assets and liabilities at the beginning of the period;

(2) Activity of the Fund during the period, including amounts received from the utility, a summary amount for purchases of fund investments and a summary amount for sales of fund investments, gains and losses from investment activity, disbursements from the Fund for decommissioning activity and payment of Fund expenses, including taxes; and

(3) Fund assets and liabilities at the end of the period. The report should not include the liability for decommissioning.

(4) Public utilities owning nuclear plants must maintain records of individual purchase and sales transactions until after decommissioning has been completed and any excess jurisdictional amounts have been returned to ratepayers in a manner that the Commission determines. The public utility need not include these records in the financial report that it furnishes to the Commission by March 31 of each year.

(e) The utility must also mail a copy of the financial report provided to the Commission pursuant to paragraph (d) of this section to anyone who requests it.

(f) If an independent public accountant has expressed an opinion on the report or on any portion of the report, then that opinion must accompany the report.

[Order 580–A, 62 FR 33348, June 19, 1997, as amended at 69 FR 18803, Apr. 9, 2004; Order 658, 70 FR 34343, June 14, 2005; Order 737, 75 FR 43404, July 26, 2010]

Subpart F—Procedures and Requirements Regarding Regional Transmission Organizations

§ 35.34 Regional Transmission Organizations.

(a) *Purpose.* This section establishes required characteristics and functions for Regional Transmission Organizations for the purpose of promoting efficiency and reliability in the operation and planning of the electric transmission grid and ensuring non-discrimination in the provision of electric transmission services. This section further directs each public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce to make certain filings with respect to forming and participating in a Regional Transmission Organization.

(b) *Definitions.* (1) *Regional Transmission Organization* means an entity that satisfies the minimum characteristics set forth in paragraph (j) of this section, performs the functions set forth in paragraph (k) of this section, and accommodates the open architecture condition set forth in paragraph (l) of this section.

(2) *Market participant* means:

(i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions; and

(ii) Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions.

(3) *Affiliate* means the definition given in section 2(a)(11) of the Public Utility Holding Company Act (15 U.S.C. 79b(a)(11)).

(4) *Class of market participants* means two or more market participants with common economic or commercial interests.

(c) *General rule.* Except for those public utilities subject to the requirements of paragraph (h) of this section, every public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000 must file with the Commission, no later than October 15, 2000, one of the following:

(1) A proposal to participate in a Regional Transmission Organization consisting of one of the types of submittals set forth in paragraph (d) of this section; or

(2) An alternative filing consistent with paragraph (g) of this section.

(d) *Proposal to participate in a Regional Transmission Organization.* For purposes of this section, a proposal to participate in a Regional Transmission Organization means:

(1) Such filings, made individually or jointly with other entities, pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as are necessary to create a new Regional Transmission Organization;

(2) Such filings, made individually or jointly with other entities, pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as are necessary to join a Regional Transmission Organization approved by the Commission on or before the date of the filing; or

(3) A petition for declaratory order, filed individually or jointly with other entities, asking whether a proposed transmission entity would qualify as a Regional Transmission Organization and containing at least the following:

(i) A detailed description of the proposed transmission entity, including a description of the organizational and operational structure and the intended participants;

(ii) A discussion of how the transmission entity would satisfy each of the characteristics and functions of a Regional Transmission Organization specified in paragraphs (j), (k) and (l) of this section;

(iii) A detailed description of the Federal Power Act section 205 rates that will be filed for the Regional Transmission Organization; and

(iv) A commitment to make filings pursuant to sections 203, 205 and 206 of the Federal Power Act (16 U.S.C. 824b, 824d, and 824e), as necessary, promptly after the Commission issues an order in response to the petition.

(4) Any proposal filed under this paragraph (d) must include an explanation of efforts made to include public power entities and electric power cooperatives in the proposed Regional Transmission Organization.

(e) [Reserved]

(f) *Transfer of operational control.* Any public utility's proposal to participate in a Regional Transmission Organization filed pursuant to paragraph (c)(1) of this section must propose that operational control of that public utility's transmission facilities will be transferred to the Regional Transmission Organization on a schedule that will allow the Regional Transmission Organization to commence operating the facilities no later than December 15, 2001.

NOTE TO PARAGRAPH (f): The requirement in paragraph (f) of this section may be satisfied

by proposing to transfer to the Regional Transmission Organization ownership of the facilities in addition to operational control.

(g) *Alternative filing.* Any filing made pursuant to paragraph (c)(2) of this section must contain:

(1) A description of any efforts made by that public utility to participate in a Regional Transmission Organization;

(2) A detailed explanation of the economic, operational, commercial, regulatory, or other reasons the public utility has not made a filing to participate in a Regional Transmission Organization, including identification of any existing obstacles to participation in a Regional Transmission Organization; and

(3) The specific plans, if any, the public utility has for further work toward participation in a Regional Transmission Organization, a proposed timetable for such activity, an explanation of efforts made to include public power entities in the proposed Regional Transmission Organization, and any factors (including any law, rule or regulation) that may affect the public utility's ability or decision to participate in a Regional Transmission Organization.

(h) *Public utilities participating in approved transmission entities.* Every public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000, and that has filed with the Commission on or before March 6, 2000 to transfer operational control of its facilities to a transmission entity that has been approved or conditionally approved by the Commission on or before March 6, 2000 as being in conformance with the eleven ISO principles set forth in Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶31,036 (Final Rule on Open Access and Stranded Costs; see 61 FR 21540, May 10, 1996), must, individually or jointly with other entities, file with the Commission, no later than January 15, 2001:

(1) A statement that it is participating in a transmission entity that has been so approved;

(2) A detailed explanation of the extent to which the transmission entity in which it participates has the characteristics and performs the functions of a Regional Transmission Organization specified in paragraphs (j) and (k) of this section and accommodates the open architecture conditions in paragraph (l) of this section; and

(3) To the extent the transmission entity in which the public utility participates does not meet all the requirements of a Regional Transmission Organization specified in paragraphs (j), (k), and (l) of this section,

(i) A proposal to participate in a Regional Transmission Organization that meets such requirements in accordance with paragraph (d) of this section,

(ii) A proposal to modify the existing transmission entity so that it conforms to the requirements of a Regional Transmission Organization, or

(iii) A filing containing the information specified in paragraph (g) of this section addressing any efforts, obstacles, and plans with respect to conformance with those requirements.

(i) *Entities that become public utilities with transmission facilities.* An entity that is not a public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce as of March 6, 2000, but later becomes such a public utility, must file a proposal to participate in a Regional Transmission Organization in accordance with paragraph (d) of this section, or an alternative filing in accordance with paragraph (g) of this section, by October 15, 2000 or 60 days prior to the date on which the public utility engages in any transmission of electric energy in interstate commerce, whichever comes later. If a proposal to participate in accordance with paragraph (d) of this section is filed, it must propose that operational control of the applicant's transmission system will be transferred to the Regional Transmission Organization within six months of filing the proposal.

(j) *Required characteristics for a Regional Transmission Organization.* A Regional Transmission Organization must satisfy the following characteristics when it commences operation:

(1) *Independence.* The Regional Transmission Organization must be independent of any market participant.

The Regional Transmission Organization must include, as part of its demonstration of independence, a demonstration that it meets the following:

(i) The Regional Transmission Organization, its employees, and any non-stakeholder directors must not have financial interests in any market participant.

(ii) The Regional Transmission Organization must have a decision making process that is independent of control by any market participant or class of participants.

(iii) The Regional Transmission Organization must have exclusive and independent authority under section 205 of the Federal Power Act (16 U.S.C. 824d), to propose rates, terms and conditions of transmission service provided over the facilities it operates.

NOTE TO PARAGRAPH (j)(1)(iii): Transmission owners retain authority under section 205 of the Federal Power Act (16 U.S.C. 824d) to seek recovery from the Regional Transmission Organization of the revenue requirements associated with the transmission facilities that they own.

(iv)(A) The Regional Transmission Organization must provide:

(*1*) With respect to any Regional Transmission Organization in which market participants have an ownership interest, a compliance audit of the independence of the Regional Transmission Organization's decision making process under paragraph (j)(1)(ii) of this section, to be performed two years after approval of the Regional Transmission Organization, and every three years thereafter, unless otherwise provided by the Commission.

(*2*) With respect to any Regional Transmission Organization in which market participants have a role in the Regional Transmission Organization's decision making process but do not have an ownership interest, a compliance audit of the independence of the Regional Transmission Organization's decision making process under paragraph (j)(1)(ii) of this section, to be performed two years after its approval as a Regional Transmission Organization.

(B) The compliance audits under paragraph (j)(1)(iv)(A) of this section must be performed by auditors who are not affiliated with the Regional Transmission Organization or transmission facility owners that are members of the Regional Transmission Organization.

(2) *Scope and regional configuration*. The Regional Transmission Organization must serve an appropriate region. The region must be of sufficient scope and configuration to permit the Regional Transmission Organization to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets.

(3) *Operational authority*. The Regional Transmission Organization must have operational authority for all transmission facilities under its control. The Regional Transmission Organization must include, as part of its demonstration of operational authority, a demonstration that it meets the following:

(i) If any operational functions are delegated to, or shared with, entities other than the Regional Transmission Organization, the Regional Transmission Organization must ensure that this sharing of operational authority will not adversely affect reliability or provide any market participant with an unfair competitive advantage. Within two years after initial operation as a Regional Transmission Organization, the Regional Transmission Organization must prepare a public report that assesses whether any division of operational authority hinders the Regional Transmission Organization in providing reliable, non-discriminatory and efficiently priced transmission service.

(ii) The Regional Transmission Organization must be the security coordinator for the facilities that it controls.

(4) *Short-term reliability*. The Regional Transmission Organization must have exclusive authority for maintaining the short-term reliability of the grid that it operates. The Regional Transmission Organization must include, as part of its demonstration with respect to reliability, a demonstration that it meets the following:

(i) The Regional Transmission Organization must have exclusive authority for receiving, confirming and implementing all interchange schedules.

(ii) The Regional Transmission Organization must have the right to order redispatch of any generator connected

to transmission facilities it operates if necessary for the reliable operation of these facilities.

(iii) When the Regional Transmission Organization operates transmission facilities owned by other entities, the Regional Transmission Organization must have authority to approve or disapprove all requests for scheduled outages of transmission facilities to ensure that the outages can be accommodated within established reliability standards.

(iv) If the Regional Transmission Organization operates under reliability standards established by another entity (*e.g.*, a regional reliability council), the Regional Transmission Organization must report to the Commission if these standards hinder it from providing reliable, non-discriminatory and efficiently priced transmission service.

(k) *Required functions of a Regional Transmission Organization*. The Regional Transmission Organization must perform the following functions. Unless otherwise noted, the Regional Transmission Organization must satisfy these obligations when it commences operations.

(1) *Tariff administration and design*. The Regional Transmission Organization must administer its own transmission tariff and employ a transmission pricing system that will promote efficient use and expansion of transmission and generation facilities. As part of its demonstration with respect to tariff administration and design, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(1)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization must be the only provider of transmission service over the facilities under its control, and must be the sole administrator of its own Commission-approved open access transmission tariff. The Regional Transmission Organization must have the sole authority to receive, evaluate, and approve or deny all requests for transmission service. The Regional Transmission Organization must have the authority to review and approve requests for new interconnections.

(ii) Customers under the Regional Transmission Organization tariff must not be charged multiple access fees for the recovery of capital costs for transmission service over facilities that the Regional Transmission Organization controls.

(2) *Congestion management*. The Regional Transmission Organization must ensure the development and operation of market mechanisms to manage transmission congestion. As part of its demonstration with respect to congestion management, the Regional Transmission Organization must satisfy the standards listed in paragraph (k)(2)(i) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The market mechanisms must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals that show the consequences of their transmission usage decisions. The Regional Transmission Organization must either operate such markets itself or ensure that the task is performed by another entity that is not affiliated with any market participant.

(ii) The Regional Transmission Organization must satisfy the market mechanism requirement no later than one year after it commences initial operation. However, it must have in place at the time of initial operation an effective protocol for managing congestion.

(3) *Parallel path flow*. The Regional Transmission Organization must develop and implement procedures to address parallel path flow issues within its region and with other regions. The Regional Transmission Organization must satisfy this requirement with respect to coordination with other regions no later than three years after it commences initial operation.

(4) *Ancillary services*. The Regional Transmission Organization must serve as a provider of last resort of all ancillary services required by Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶ 31,036 (Final Rule on Open Access and Stranded Costs; see 61 FR 21540, May 10, 1996), and subsequent orders.

As part of its demonstration with respect to ancillary services, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(4)(i) through (iii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) All market participants must have the option of self-supplying or acquiring ancillary services from third parties subject to any restrictions imposed by the Commission in Order No. 888, FERC Statutes and Regulations, Regulations Preamble January 1991–June 1996 ¶31,036 (Final Rule on Open Access and Stranded Costs), and subsequent orders.

(ii) The Regional Transmission Organization must have the authority to decide the minimum required amounts of each ancillary service and, if necessary, the locations at which these services must be provided. All ancillary service providers must be subject to direct or indirect operational control by the Regional Transmission Organization. The Regional Transmission Organization must promote the development of competitive markets for ancillary services whenever feasible.

(iii) The Regional Transmission Organization must ensure that its transmission customers have access to a real-time balancing market. The Regional Transmission Organization must either develop and operate this market itself or ensure that this task is performed by another entity that is not affiliated with any market participant.

(5) *OASIS and Total Transmission Capability (TTC) and Available Transmission Capability (ATC).* The Regional Transmission Organization must be the single OASIS site administrator for all transmission facilities under its control and independently calculate TTC and ATC.

(6) *Market monitoring.* To ensure that the Regional Transmission Organization provides reliable, efficient and not unduly discriminatory transmission service, the Regional Transmission Organization must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements, and propose appropriate actions. As part of its demonstration with respect to market monitoring, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(6)(i) through (k)(6)(iii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) Market monitoring must include monitoring the behavior of market participants in the region, including transmission owners other than the Regional Transmission Organization, if any, to determine if their actions hinder the Regional Transmission Organization in providing reliable, efficient and not unduly discriminatory transmission service.

(ii) With respect to markets the Regional Transmission Organization operates or administers, there must be a periodic assessment of how behavior in markets operated by others (*e.g.*, bilateral power sales markets and power markets operated by unaffiliated power exchanges) affects Regional Transmission Organization operations and how Regional Transmission Organization operations affect the efficiency of power markets operated by others.

(iii) Reports on opportunities for efficiency improvement, market power abuses and market design flaws must be filed with the Commission and affected regulatory authorities.

(7) *Planning and expansion.* The Regional Transmission Organization must be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities. As part of its demonstration with respect to planning and expansion, the Regional Transmission Organization must satisfy the standards listed in paragraphs (k)(7)(i) and (ii) of this section, or demonstrate that an alternative proposal is consistent with or superior to satisfying such standards.

(i) The Regional Transmission Organization planning and expansion process must encourage market-driven operating and investment actions for preventing and relieving congestion.

(ii) The Regional Transmission Organization's planning and expansion process must accommodate efforts by state regulatory commissions to create multi-state agreements to review and approve new transmission facilities. The Regional Transmission Organization's planning and expansion process must be coordinated with programs of existing Regional Transmission Groups (See § 2.21 of this chapter) where appropriate.

(iii) If the Regional Transmission Organization is unable to satisfy this requirement when it commences operation, it must file with the Commission a plan with specified milestones that will ensure that it meets this requirement no later than three years after initial operation.

(8) *Interregional coordination.* The Regional Transmission Organization must ensure the integration of reliability practices within an interconnection and market interface practices among regions.

(l) *Open architecture.* (1) Any proposal to participate in a Regional Transmission Organization must not contain any provision that would limit the capability of the Regional Transmission Organization to evolve in ways that would improve its efficiency, consistent with the requirements in paragraphs (j) and (k) of this section.

(2) Nothing in this regulation precludes an approved Regional Transmission Organization from seeking to evolve with respect to its organizational design, market design, geographic scope, ownership arrangements, or methods of operational control, or in other appropriate ways if the change is consistent with the requirements of this section. Any future filing seeking approval of such changes must demonstrate that the proposed changes will meet the requirements of paragraphs (j), (k) and (l) of this section.

[Order 2000–A, 65 FR 12110, Mar. 8, 2000, as amended by Order 679, 71 FR 43338, July 31, 2006]

Subpart G—Transmission Infrastructure Investment Provisions

§ 35.35 Transmission infrastructure investment.

(a) *Purpose.* This section establishes rules for incentive-based (including performance-based) rate treatments for transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.

(b) *Definitions.* (1) *Transco* means a stand-alone transmission company that has been approved by the Commission and that sells transmission services at wholesale and/or on an unbundled retail basis, regardless of whether it is affiliated with another public utility.

(2) *Transmission Organization* means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(c) *General rule.* All rates approved under the rules of this section, including any revisions to the rules, are subject to the filing requirements of sections 205 and 206 of the Federal Power Act and to the substantive requirements of sections 205 and 206 of the Federal Power Act that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory or preferential.

(d) *Incentive-based rate treatments for transmission infrastructure investment.* The Commission will authorize any incentive-based rate treatment, as discussed in this paragraph (d), for transmission infrastructure investment, provided that the proposed incentive-based rate treatment is just and reasonable and not unduly discriminatory or preferential. A public utility's request for one or more incentive-based rate treatments, to be made in a filing pursuant to section 205 of the Federal Power Act, or in a petition for a declaratory order that precedes a filing pursuant to section 205, must include a detailed explanation of how the proposed

SUBCHAPTER C—ACCOUNTS, FEDERAL POWER ACT

PART 101—UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR PUBLIC UTILITIES AND LICENSEES SUBJECT TO THE PROVISIONS OF THE FEDERAL POWER ACT

AUTHORITY: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352, 7651–7651o.

SOURCE: Order 218, 25 FR 5014, June 7, 1960, unless otherwise noted.

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting part 101, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

EFFECTIVE DATE NOTE: At 58 FR 18004–18006, Apr. 7, 1993, part 101 was amended by redesignating Definitions 30 through 38 as 31 through 39 and adding new Definition 30; adding paragraph 21 under the General Instructions; adding Accounts 158.1, 158.2, 182.3, and 254 under Balance Sheet Accounts; adding Accounts 407.3, 407.4, 411.8, and 411.9 under Income Accounts; and adding Account 509 under Operation and Maintenance Expense Accounts. The added text contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

NOTE: Order 141, 12 FR 8503, Dec. 19, 1947, provides in part as follows:

Prescribing a system of accounts for public utilities and licensees under the Federal Power Act. The Federal Power Commission acting pursuant to authority granted by the Federal Power Act, particularly sections 301(a), 304(a), and 309, and paragraph (13) of section 3, section 4(b) thereof, and finding such action necessary and appropriate for carrying out the provisions of said act, hereby adopts the accompanying system of accounts entitled ''Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act,'' and the rules and regulations contained therein; and *It is hereby ordered:*

(a) That said system of accounts and said rules and regulations contained therein be and the same are hereby prescribed and promulgated as the system of accounts and rules and regulations of the Commission to be kept and observed by public utilities subject to the jurisdiction of the Commission and by licensees holding licenses issued by the Commission, to the extent and in the manner set forth therein;

(b) That said system of accounts and rules and regulations therein contained shall, as to all public utilities now subject to the jurisdiction of the Commission and as to all present licensees, become effective on January 1, 1937, and as to public utilities and licensees which may hereafter become subject to the jurisdiction of the Commission, they shall become effective as of the date when such public utility becomes subject to the jurisdiction of the Commission or on the effective date of the license;

(c) That a copy of said system of accounts and rules and regulation contained therein be forthwith served upon each public utility subject to the jurisdiction of the Commission, and each licensee or permittee holding a license or permit from the Commission.

This system of accounts supersedes the system of accounts prescribed for licensees under the Federal Water Power Act; and Order No. 13, entered November 20, 1922, prescribing said system of accounts, was rescinded effective January 1, 1937.

Applicability of system of accounts. This system of accounts is applicable in principle to all licensees subject to the Commission's accounting requirements under the Federal Power Act, and to all public utilities subject to the provisions of the Federal Power Act. The Commission reserves the right, however, under the provisions of section 301(a) of the Federal Power Act to classify such licensees and public utilities and to prescribe a system of classification of accounts to be kept by and which will be convenient for and meet the requirements of each class.

This system of accounts is applicable to public utilities, as defined in this part, and to licensees engaged in the generation and sale of electric energy for ultimate distribution to the public.

This system of accounts shall also apply to agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public, so far as may be practicable, in accordance with applicable statutes.

In accordance with the requirements of section 3 of the Act (49 Stat. 839; 16 U.S.C. 796(13)), the ''classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'', is published and promulgated as a part of the accounting rules and regulations of the Commission, and a copy thereof appears as part 103 of this chapter. Irrespective of any rules and regulations contained in this system of accounts, the cost of original projects licensed under the Act, and also the cost of additions thereto and betterments thereof, shall be determined under the rules and principles as defined and interpreted in said classification of the Interstate Commerce Commission so far as applicable.

CROSS REFERENCES: For application of uniform system of accounts to Class C and D public utilities and licensees, see part 104 of this chapter. For statements and reports, see part 141 of this chapter.

Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act

Definitions

When used in this system of accounts:

1. *Accounts* means the accounts prescribed in this system of accounts.

2. *Actually issued*, as applied to securities issued or assumed by the utility, means those which have been sold to bona fide purchasers for a valuable consideration, those issued as dividends on stock, and those which have been issued in accordance with contractual requirements direct to trustees of sinking funds.

3. *Actually outstanding*, as applied to securities issued or assumed by the utility, means those which have been actually issued and are neither retired nor held by or for the utility; provided, however, that securities held by trustees shall be considered as actually outstanding.

4. *Amortization* means the gradual extinguishment of an amount in an account by distributing such amount over a fixed period, over the life of the asset or liability to which it applies, or over the period during which it is anticipated the benefit will be realized.

5. A. *Associated (affiliated) companies* means companies or persons that directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, the accounting company.

B. *Control* (including the terms *controlling*, *controlled by*, and *under common control with*) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, associated companies, contract or any other direct or indirect means.

6. *Book cost* means the amount at which property is recorded in these accounts without deduction of related provisions for accrued depreciation, amortization, or for other purposes.

7. *Commission*, means the Federal Energy Regulatory Commission.

8. *Continuing Plant Inventory Record* means company plant records for retirement units and mass property that provide, as either a single record, or in separate records readily obtainable by references made in a single record, the following information:

A. For each retirement unit:

(1) The name or description of the unit, or both;

(2) The location of the unit;

(3) The date the unit was placed in service;

(4) The cost of the unit as set forth in Plant Instructions 2 and 3 of this part; and

(5) The plant control account to which the cost of the unit is charged; and

B. For each category of mass property:

(1) A general description of the property and quantity;

(2) The quantity placed in service by vintage year;

(3) The average cost as set forth in Plant Instructions 2 and 3 of this part; and

(4) The plant control account to which the costs are charged.

9. *Cost* means the amount of money actually paid for property or services. When the consideration given is other than cash in a purchase and sale transaction, as distinguished from a transaction involving the issuance of common stock in a merger or a pooling of interest, the value of such consideration shall be determined on a cash basis.

10. *Cost of removal* means the cost of demolishing, dismantling, tearing down or otherwise removing electric plant, including the cost of transportation and handling incidental thereto. It does not include the cost of removal

activities associated with asset retirement obligations that are capitalized as part of the tangible long-lived assets that give rise to the obligation. (*See* General Instruction 25).

11. *Debt expense* means all expenses in connection with the issuance and initial sale of evidences of debt, such as fees for drafting mortgages and trust deeds; fees and taxes for issuing or recording evidences of debt; cost of engraving and printing bonds and certificates of indebtedness; fees paid trustees; specific costs of obtaining governmental authority; fees for legal services; fees and commissions paid underwriters, brokers, and salesmen for marketing such evidences of debt; fees and expenses of listing on exchanges; and other like costs.

12. *Depreciation,* as applied to depreciable electric plant, means the loss in service value not restored by current maintenance, incurred in connection with the consumption or prospective retirement of electric plant in the course of service from causes which are known to be in current operation and against which the utility is not protected by insurance. Among the causes to be given consideration are wear and tear, decay, action of the elements, inadequacy, obsolescence, changes in the art, changes in demand and requirements of public authorities.

13. *Discount,* as applied to the securities issued or assumed by the utility, means the excess of the par (stated value of no-par stocks) or face value of the securities plus interest or dividends accrued at the date of the sale over the cash value of the consideration received from their sale.

14. *Investment advances* means advances, represented by notes or by book accounts only, with respect to which it is mutually agreed or intended between the creditor and debtor that they shall be settled by the issuance of securities or shall not be subject to current settlement.

15. *Lease, capital* means a lease of property used in utility or nonutility operations, which meets one or more of the criteria stated in General Instruction 19.

16. *Lease, operating* means a lease of property used in utility or nonutility operations, which does not meet any of the criteria stated in General Instruction 19.

17. *Licensee* means any person, or State, licensed under the provisions of the Federal Power Act and subject to the Commission's accounting requirements under the terms of the license.

18. *Minor items of property* means the associated parts or items of which retirement units are composed.

19. *Net salvage value* means the salvage value of property retired less the cost of removal.

20. *Nominally issued,* as applied to securities issued or assumed by the utility, means those which have been signed, certified, or otherwise executed, and placed with the proper officer for sale and delivery, or pledged, or otherwise placed in some special fund of the utility, but which have not been sold, or issued direct to trustees of sinking funds in accordance with contractual requirements.

21. *Nominally outstanding,* as applied to securities issued or assumed by the utility, means those which, after being actually issued, have been reacquired by or for the utility under circumstances which require them to be considered as held alive and not retired, provided, however, that securities held by trustees shall be considered as actually outstanding.

22. *Nonproject property* means the electric plant of a licensee which is not a part of the project property subject to a license issued by the Commission.

23. *Original cost,* as applied to electric plant, means the cost of such property to the person first devoting it to public service.

24. *Person* means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, or any organized group of persons, whether incorporated or not, or any receiver or trustee.

25. *Premium,* as applied to securities issued or assumed by the utility, means the excess of the cash value of the consideration received from their sale over the sum of their par (stated value of no-par stocks) or face value and interest or dividends accrued at the date of sale.

26. *Project* means complete unit of improvement or development, consisting of a power house, all water conduits,

all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

27. *Project property* means the property described in and subject to a license issued by the Commission.

28. *Property retired*, as applied to electric plant, means property which has been removed, sold, abandoned, destroyed, or which for any cause has been withdrawn from service.

29. *Public utility* means any person who owns or operates facilities subject to the jurisdiction of the Commission under the Federal Power Act. (See section 201(e) of said act.)

30. *Regional market* means an organized energy market operated by a public utility, whether directly or through a contractual relationship with another entity.

31. *Regulatory Assets and Liabilities* are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determination in one period under the general requirements of the Uniform System of Accounts but for it being probable:

A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or

B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.

32. A. *Replacing* or *replacement*, when not otherwise indicated in the context, means the construction or installation of electric plant in place of property retired, together with the removal of the property retired.

B. *Research, Development, and Demonstration* (RD&D) in the case of Major utilities means expenditures incurred by public utilities and licensees either directly or through another person or organization (such as research institute, industry association, foundation, university, engineering company or similar contractor) in pursuing research, development, and demonstration activities including experiment, design, installation, construction, or operation. This definition includes expenditures for the implementation or development of new and/or existing concepts until technically feasible and commercially feasible operations are verified. Such research, development, and demonstration costs should be reasonably related to the existing or future utility business, broadly defined, of the public utility or licensee or in the environment in which it operates or expects to operate. The term includes, but is not limited to: All such costs incidental to the design, development or implementation of an experimental facility, a plant process, a product, a formula, an invention, a system or similar items, and the improvement of already existing items of a like nature; amounts expended in connection with the proposed development and/or proposed delivery of alternate sources of electricity; and the costs of obtaining its own patent, such as attorney's fees expended in making and perfecting a patent application. The term includes preliminary investigations and detailed planning of specific projects for securing for customers non-conventional electric power supplies that rely on technology that has not been verified previously to be feasible. The term does not include expenditures for efficiency surveys; studies of management, management techniques and organization; consumer surveys, advertising, promotions, or items of a like nature.

33. *Retained Earnings* (formerly earned surplus) means the accumulated net income of the utility less distribution to stockholders and transfers to other capital accounts.

34. *Retirement units* means those items of electric plant which, when retired, with or without replacement, are accounted for by crediting the book cost thereof to the electric plant account in which included.

35. *Salvage value* means the amount received for property retired, less any expenses incurred in connection with the sale or in preparing the property for sale; or, if retained, the amount at which the material recoverable is chargeable to materials and supplies, or other appropriate account.

36. *Service life* means the time between the date electric plant is includible in electric plant in service, or electric plant leased to others, and the date of its retirement. If depreciation is accounted for on a production basis rather than on a time basis, then service life should be measured in terms of the appropriate unit of production.

37. *Service value* means the difference between original cost and net salvage value of electric plant.

38. *State* means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

39. *Subsidiary Company* in the case of Major utilities means a company which is controlled by the utility through ownership of voting stock. (See *Definitions* item 5B, *Control*). A corporate joint venture in which a corporation is owned by a small group of businesses as a separate and specific business or project for the mutual benefit of the members of the group is a subsidiary company for the purposes of this system of accounts.

40. *Utility*, as used herein and when not otherwise indicated in the context, means any public utility or licensee to which this system of accounts is applicable.

General Instructions

1. *Classification of utilities.*

A. For purpose of applying the system of accounts prescribed by the Commission, electric utilities and licensees are divided into classes, as follows:

(1) *Major.* Utilities and licensees that had, in each of the last three consecutive years, sales or transmission service that exceeded any one or more of the following:

(a) One million megawatt-hours of total sales;

(b) 100 megawatt-hours of sales for resale;

(c) 500 megawatt-hours of power exchanges delivered; or

(d) 500 megawatt-hours of wheeling for others (deliveries plus losses).

(2) *Nonmajor.* Utilities and licensees that are not classified as *Major* (as defined above), and had total sales in each of the last three consecutive years of 10,000 megawatt-hours or more.

(3) *Nonoperating.* Utilities and licensees formerly designated as Major or Nonmajor that have ceased operation but continue to collect amounts pursuant to a Commission-accepted tariff or rate schedule, or a Commission order.

B. This system applies to Major, Nonmajor, and Nonoperating utilities and licensees. Provisions have been incorporated into this system for those entities which, prior to January 1, 1984, were applying the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees subject to the Provisions of the Federal Power Act (Class C and Class D) [part 104 of this chapter, now revoked]. The notations (*Nonmajor*) and (*Major*) have been used to indicate those instructions and accounts from previous systems and classifications, which by definition, are not interchangeable without causing a loss of detail for the Major (previously Class A and Class B) or an increase in detail burden on the Nonmajor (previously Class C and Class D).

C. The class to which any utility or licensee belongs will originally be determined by its annual megawatt hours in each of the last three consecutive years, or in the case of a newly established entity, the projected data shall be the basis. Subsequent changes in classification shall be made as necessary when the megawatt-hours for each of the three immediately preceding years shall exceed the upper limit, or be less than the lower limit of the classification previously applicable to the utility.

B. NUCLEAR PRODUCTION

320 Land and land rights (Major only).
321 Structures and improvements (Major only).
322 Reactor plant equipment (Major only).
323 Turbogenerator units (Major only).
324 Accessory electric equipment (Major only).
325 Miscellaneous power plant equipment (Major only).
326 Asset retirement costs for nuclear production plant (Major only).

C. HYDRAULIC PRODUCTION

330 Land and land rights.
331 Structures and improvements.
332 Reservoirs, dams, and waterways.
333 Water wheels, turbines and generators.
334 Accessory electric equipment.
335 Miscellaneous power plant equipment.
336 Roads, railroads and bridges.
337 Asset retirement costs for hydraulic production plant.

D. OTHER PRODUCTION

340 Land and land rights.
341 Structures and improvements.
342 Fuel holders, producers, and accessories.
343 Prime movers.
344 Generators.
345 Accessory electric equipment.
346 Miscellaneous power plant equipment.
347 Asset retirement costs for other production plant.
348 Energy Storage Equipment—Production

3. TRANSMISSION PLANT

350 Land and land rights.
351 [Reserved]
352 Structures and improvements.
353 Station equipment.
354 Towers and fixtures.
355 Poles and fixtures.
356 Overhead conductors and devices.
357 Underground conduit.
358 Underground conductors and devices.
359 Roads and trails.
359.1 Asset retirement costs for transmission plant.

4. DISTRIBUTION PLANT

360 Land and land rights.
361 Structures and improvements.
362 Station equipment.
363 Storage battery equipment.
364 Poles, towers and fixtures.
365 Overhead conductors and devices
366 Underground conduit.
367 Underground conductors and devices
368 Line transformers.
369 Services.
370 Meters.
371 Installations on customers' premises
372 Leased property on customers' premises.
373 Street lighting and signal systems.
374 Asset retirement costs for distribution plant.

5. REGIONAL TRANSMISSION AND MARKET OPERATION PLANT

380 Land and land rights.
381 Structures and improvements.
382 Computer hardware.
383 Computer software.
384 Communication Equipment.
385 Miscellaneous Regional Transmission and Market Operation Plant.
386 Asset Retirement Costs for Regional Transmission and Market Operation Plant.
387 [Reserved]

6. GENERAL PLANT

389 Land and land rights.
390 Structures and improvements.
391 Office furniture and equipment.
392 Transportation equipment.
393 Stores equipment.
394 Tools, shop and garage equipment.
395 Laboratory equipment.
396 Power operated equipment.
397 Communication equipment.
398 Miscellaneous equipment.
399 Other tangible property.
399.1 Asset retirement costs for general plant.

Electric Plant Accounts

301 Organization.

This account shall include all fees paid to federal or state governments for the privilege of incorporation and expenditures incident to organizing the corporation, partnership, or other enterprise and putting it into readiness to do business.

ITEMS

1. Cost of obtaining certificates authorizing an enterprise to engage in the public-utility business.
2. Fees and expenses for incorporation
3. Fees and expenses for mergers or consolidations.
4. Office expenses incident to organizing the utility.
5. Stock and minute books and corporate seal.

NOTE A: This account shall not include any discounts upon securities issued or assumed; nor shall it include any costs incident to negotiating loans, selling bonds or other evidences of debt or expenses in connection with the authorization, issuance or sale of capital stock.

NOTE B: Exclude from this account and include in the appropriate expense account the

cost of preparing and filing papers in connection with the extension of the term of incorporation unless the first organization costs have been written off. When charges are made to this account for expenses incurred in mergers, consolidations, or reorganizations, amounts previously included herein or in similar accounts in the books of the companies concerned shall be excluded from this account.

302 Franchises and consents.

A. This account shall include amounts paid to the federal government, to a state or to a political subdivision thereof in consideration for franchises, consents, water power licenses, or certificates, running in perpetuity or for a specified term of more than one year, together with necessary and reasonable expenses incident to procuring such franchises, consents, water power licenses, or certificates of permission and approval, including expenses of organizing and merging separate corporations, where statutes require, solely for the purpose of acquiring franchises.

B. If a franchise, consent, water power license or certificate is acquired by assignment, the charge to this account in respect thereof shall not exceed the amount paid therefor by the utility to the assignor, nor shall it exceed the amount paid by the original grantee, plus the expense of acquisition to such grantee. Any excess of the amount actually paid by the utility over the amount above specified shall be charged to account 426.5, Other Deductions.

C. When any franchise has expired, the book cost thereof shall be credited hereto and charged to account 426.5, Other Deductions, or to account 111, Accumulated Provision for Amortization of Electric Utility Plant (for Nonmajor utilities, account 110, Accumulated Provision for Depreciation and Amortization of Electric Plant), as appropriate.

D. Records supporting this account shall be kept so as to show separately the book cost of each franchise or consent.

NOTE: Annual or other periodic payments under franchises shall not be included herein but in the appropriate operating expense account.

303 Miscellaneous intangible plant.

A. This account shall include the cost of patent rights, licenses, privileges, and other intangible property necessary or valuable in the conduct of utility operations and not specifically chargeable to any other account.

B. When any item included in this account is retired or expires, the book cost thereof shall be credited hereto and charged to account 426.5, Other Deductions, or account 111, Accumulated Provision for Amortization of Electric Utility Plant (for Nonmajor utilities, account 110, Accumulated Provision for Depreciation and Amortization of Electric Plant), as appropriate.

C. This account shall be maintained in such a manner that the utility can furnish full information with respect to the amounts included herein.

310 Land and land rights.

This account shall include the cost of land and land rights used in connection with steam-power generation. (See electric plant instruction 7.)

311 Structures and improvements.

This account shall include the cost in place of structures and improvements used in connection with steam-power generation. (See electric plant instruction 8.)

NOTE: Include steam production roads and railroads in this account.

312 Boiler plant equipment.

This account shall include the cost installed of furnaces, boilers, coal and ash handling and coal preparing equipment, steam and feed water piping, boiler apparatus and accessories used in the production of steam, mercury, or other vapor, to be used primarily for generating electricity.

ITEMS

1. Ash handling equipment, including hoppers, gates, cars, conveyors, hoists, sluicing equipment, including pumps and motors, sluicing water pipe and fittings, sluicing trenches and accessories, etc., except sluices which are a part of a building.

2. Boiler feed system, including feed water heaters, evaporator condensers, heater drain pumps, heater drainers, deaerators, and vent condensers, boiler feed pumps, surge tanks, feed water regulators, feed water measuring equipment, and all associated drives.

property to another. Amounts relating to gains on land and land rights held for future use recorded in account 105, Electric Plant Held for Future Use will be accounted for as prescribed in paragraphs B, C, and D thereof. (See electric plant instructions 5F, 7E, and 10E.) Income taxes on gains recorded in this account shall be recorded in account 409.2, Income Taxes, Other Income and Deductions.

421.2 Loss on disposition of property.

This account shall be charged with the loss on the sale, conveyance, exchange or transfer of utility or other property to another. Amounts relating to losses on land and land rights held for future use recorded in account 105, Electric Plant Held for Future Use will be accounted for as prescribed in paragraphs B, C, and D thereof. (See electric plant instructions 5F, 7E, and 10E.) The reduction in income taxes relating to losses recorded in this account shall be recorded in account 409.2, Income Taxes, Other Income and Deductions.

425 Miscellaneous amortization.

This account shall include amortization charges not includible in other accounts which are properly deductible in determining the income of the utility before interest charges. Charges includible herein, if significant in amount, must be in accordance with an orderly and systematic amortization program.

ITEMS

1. Amortization of utility plant acquisition adjustments, or of intangibles included in utility plant in service when not authorized to be included in utility operating expenses by the Commission.
2. Other miscellaneous amortization charges allowed to be included in this account by the Commission.

426 [Reserved]

SPECIAL INSTRUCTIONS—ACCOUNTS 426.1, 426.2, 426.3, 426.4 AND 426.5

These accounts shall include miscellaneous expense items which are nonoperating in nature but which are properly deductible before determining total income before interest charges.

NOTE: The classification of expenses as nonoperating and their inclusion in these accounts is for accounting purposes. It does not preclude Commission consideration of proof to the contrary for ratemaking or other purposes.

426.1 Donations.

This account shall include all payments or donations for charitable, social or community welfare purposes.

426.2 Life insurance.

This account shall include all payments for life insurance of officers and employees where company is beneficiary (net premiums less increase in cash surrender value of policies).

426.3 Penalties.

This account shall include payments by the company for penalties or fines for violation of any regulatory statutes by the company or its officials.

426.4 Expenditures for certain civic, political and related activities.

This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

426.5 Other deductions.

This account shall include other miscellaneous expenses which are nonoperating in nature, but which are properly deductible before determining total income before interest charges.

ITEMS

1. Loss relating to investments in securities written-off or written-down.
2. Loss on sale of investments.
3. Loss on reacquisition, resale or retirement of utility's debt securities, when the loss is not amortized and used by a jurisdictional regulatory agency to increase embedded debt cost in establishing rates. See General Instruction 17.

5. Communication service expenses.
6. Cost of individual items of office equipment used by general departments which are of small value or short life.
7. Membership fees and dues in trade, technical, and professional associations paid by a utility for employees. (Company memberships are includible in account 930.2.)
8. Office supplies and expenses.
9. Payment of court costs, witness fees and other expenses of legal department.
10. Postage, printing and stationery.
11. Meals, traveling and incidental expenses.

922 Administrative expenses transferred—Credit.

This account shall be credited with administrative expenses recorded in accounts 920 and 921 which are transferred to construction costs or to nonutility accounts. (See electric plant instruction 4.)

923 Outside services employed.

A. This account shall include the fees and expenses of professional consultants and others for general services which are not applicable to a particular operating function or to other accounts. It shall include also the pay and expenses of persons engaged for a special or temporary administrative or general purpose in circumstances where the person so engaged is not considered as an employee of the utility.

B. This account shall be so maintained as to permit ready summarization according to the nature of service and the person furnishing the same.

ITEMS

1. Fees, pay and expenses of accountants and auditors, actuaries, appraisers, attorneys, engineering consultants, management consultants, negotiators, public relations counsel, tax consultants, etc.
2. Supervision fees and expenses paid under contracts for general management services.

NOTE: Do not include inspection and brokerage fees and commissions chargeable to other accounts or fees and expenses in connection with security issues which are includible in the expenses of issuing securities.

924 Property insurance.

A. This account shall include the cost of insurance or reserve accruals to protect the utility against losses and damages to owned or leased property used in its utility operations. It shall include also the cost of labor and related supplies and expenses incurred in property insurance activities.

B. Recoveries from insurance companies or others for property damages shall be credited to the account charged with the cost of the damage. If the damaged property has been retired, the credit shall be to the appropriate account for accumulated provision for depreciation.

C. Records shall be kept so as to show the amount of coverage for each class of insurance carried, the property covered, and the applicable premiums. Any dividends distributed by mutual insurance companies shall be credited to the accounts to which the insurance premiums were charged.

ITEMS

1. Premiums payable to insurance companies for fire, storm, burglary, boiler explosion, lightning, fidelity, riot, and similar insurance.
2. Amounts credited to account 228.1, Accumulated Provision for Property Insurance, for similar protection.
3. Special costs incurred in procuring insurance.
4. Insurance inspection service.
5. Insurance counsel, brokerage fees, and expenses.

NOTE A: The cost of insurance or reserve accruals capitalized shall be charged to construction either directly or by transfer to construction work orders from this account.

NOTE B: The cost of insurance or reserve accruals for the following classes of property shall be charged as indicated.

(1) Materials and supplies and stores equipment, to account 163, Stores Expense Undistributed (store expenses in the case of Nonmajor utilities), or appropriate materials account.

(2) For Major Utilities, transportation and other general equipment to appropriate clearing accounts that may be maintained. For Nonmajor utilities, transportation and garage equipment, to account 933, Transportation Expenses.

(3) Electric plant leased to others, to account 413, Expenses of Electric Plant Leased to Others.

(4) Nonutility property, to the appropriate nonutility income account.

(5) Merchandise and jobbing property, to Account 416, Costs and Expenses of Merchandising, Jobbing and Contract Work.

NOTE C (MAJOR ONLY): The cost of labor and related supplies and expenses of administrative and general employees who are only incidentally engaged in property insurance

from its own supply. Include, also, offsetting credits for any other charges made to operating expenses for which there is no direct money outlay.

930.1 General advertising expenses.

This account shall include the cost of labor, materials used, and expenses incurred in advertising and related activities, the cost of which by their content and purpose are not provided for elsewhere.

ITEMS

Labor:

1. Supervision.
2. Preparing advertising material for newspapers, periodicals, billboards, etc., and preparing or conducting motion pictures, radio and television programs.
3. Preparing booklets, bulletins, etc., used in direct mail advertising.
4. Preparing window and other displays.
5. Clerical and stenographic work.
6. Investigating and employing advertising agencies, selecting media and conducting negotiations in connection with the placement and subject matter of advertising.

Materials and Expenses:

7. Advertising in newspapers, periodicals, billboards, radio, etc.
8. Advertising matter such as posters, bulletins, booklets, and related items.
9. Fees and expenses of advertising agencies and commercial artists.
10. Postage and direct mail advertising.
11. Printing of booklets, dodgers, bulletins, etc.
12. Supplies and expenses in preparing advertising materials.
13. Office supplies and expenses.

NOTE A: Properly includible in this account is the cost of advertising activities on a local or national basis of a good will or institutional nature, which is primarily designed to improve the image of the utility or the industry, including advertisements which inform the public concerning matters affecting the company's operations, such as, the cost of providing service, the company's efforts to improve the quality of service, the company's efforts to improve and protect the environment, etc. Entries relating to advertising included in this account shall contain or refer to supporting documents which identify the specific advertising message. If references are used, copies of the advertising message shall be readily available.

NOTE B: Exclude from this account and include in account 426.4, Expenditures for Certain Civic, Political and Related Activities, expenses for advertising activities, which are designed to solicit public support or the support of public officials in matters of a political nature.

930.2 Miscellaneous general expenses.

This account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere.

ITEMS

Labor:

1. Miscellaneous labor not elsewhere provided for.

Expenses:

2. Industry association dues for company memberships.
3. Contributions for conventions and meetings of the industry.
4. For Major utilities, research, development, and demonstration expenses not charged to other operation and maintenance expense accounts on a functional basis.
5. Communication service not chargeable to other accounts.
6. Trustee, registrar, and transfer agent fees and expenses.
7. Stockholders meeting expenses.
8. Dividend and other financial notices.
9. Printing and mailing dividend checks.
10. Directors' fees and expenses.
11. Publishing and distributing annual reports to stockholders.
12. Public notices of financial, operating and other data required by regulatory statutes, not including, however, notices required in connection with security issues or acquisitions of property. For Nonmajor utilities, transportation and garage equipment, to account 933, Transportation Expenses.

931 Rents.

This account shall include rents properly includible in utility operating expenses for the property of others used, occupied, or operated in connection with the customer accounts, customer service and informational, sales, and general and administrative functions of the utility. (See operating expense instruction 3.)

933 Transportation expenses (Nonmajor only).

A. This account shall include the cost of labor, materials used and expenses incurred in the operation and maintenance of general transportation equipment of the utility.

B. This account may be used as a clearing account in which event the

Order Amended by EXPENDITURES FOR POLITICAL PURPOSES-AMENDMENT OF ACCOUNT 426, OTHER INCOME DEDUCTIONS, UNIFORM SYSTEM OF ACCOUNTS, AND REPORT FORMS PRESCRIBED FOR ELECTRIC UTILITIES AND LICENSEES AND NATURAL GAS COMPANIES-FPC FORMS NOS. 1 AND 2,, F.P.C., February 11, 1964

30 F.P.C. 1539, 1963 WL 4051

EXPENDITURES FOR POLITICAL PURPOSES—AMENDMENT OF ACCOUNT 426, OTHER INCOME DEDUCTIONS, UNIFORM SYSTEM OF ACCOUNTS, AND REPORT FORMS PRESCRIBED FOR ELECTRIC UTILITIES AND LICEN- SEES AND NATURAL GAS COMPANIES—FPC FORMS NOS. 1 AND 2,

DOCKET NO. R–226
ORDER NO. 276
ORDER REVISING ACCOUNT 426, OTHER INCOME DEDUCTIONS, AND ANNUAL REPORT FORMS
December 18, 1963

****1*1539** Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black.

The Commission has under consideration in this proceeding the amendment of Account 426 of its Uniform System of Accounts, Other Income Deductions, by the promulgation of five new subaccounts within the present Account 426. It also has under consideration the revision of Instruction No. 3 to the Schedule of Particulars Concerning Certain Income Deduction and Interest Charges Accounts included in FPC Forms Nos. 1 and 2, Annual Reports of Electric Utilities and Licensees (Classes A and B) and of Natural Gas Companies (Classes A and B), respectively, to provide for the reporting within that schedule of amounts entered in newly designated Subaccounts 426.1, 426.2, 426.3 and 426.5; and the further revision of its FPC Forms Nos. 1 and 2 to require that all expenditures for political purposes to be included in newly designated Subaccount 426.4 be reported in a separate schedule.

This proceeding was commenced by a notice of proposed rulemaking served upon interested parties, including State and Federal regulatory agencies, and by publication in the Federal Register on December 28, 1962 (27 F.R. 12839). The proposed amendment of Account 426 by the promulgation of five subaccounts (Subaccounts 426.1, 426.2, 426.3, 426.4 and 426.5) and the proposed revisions of FPC Forms Nos. 1 and 2 by changing the present wording of Instruction No. 3 to the Schedule of Particulars Concerning Certain Income Deduction and Interest Charges Accounts and by adding a separate schedule entitled 'Expenditures for Political Purposes' were set forth in the notice.

Currently, Account 426 is utilized for recording numerous expenditures, which are primarily non-operating in nature, of public utilities and licensees subject to the provisions of the Federal Power Act and of natural gas companies subject to the provisions of the Natural Gas Act. Representative non-operating expenditures include items such as donations; life insurance of officers and employees wherein the public utility or gas company is beneficiary; penalties for violation of regulatory statutes; expenditures for the purpose of influencing public opinion as to the election of public officers, referenda, proposed legislation, proposed ordinances, repeal of existing laws or ordinances, and approval ***1540** or revocation of franchises; and expenditures for the purpose of influencing decisions of public officers. The utilization of five subaccounts within the present Account 426 will make possible for the first time the separate classification and identification of five categories of income deductions that cannot now be individually identified from the account balance in Account 426. The Amendments to Forms Nos. 1 and 2 will provide for more detailed annual reporting of the various categories of expenditures.

****2** The notice of proposed rulemaking afforded a period of 55 days for the submission to the Commission of written data, views, comments and suggestions concerning the proposed amendments. Ninety-six responses were received from numerous segments of the electric and gas industry, mass communication and advertising media, state public service commissions, professional, press, radio and television associations, law firms and individual citizens. All have been given due consideration by the Commission. We are adopting certain of the suggested modifications of the original proposals and are rejecting the others for the reasons hereinafter set forth.

A principal source of criticism of the rules as originally proposed by the Commission was that the proposed Subaccount 426.4, relating to expenditures for political purposes, had been drafted in a manner which not only was ambiguous and indefinite as to exactly what expenditures were intended to be included but also appeared to include expenditures—of which regulatory expenses are typical—which properly should be included in above-the-line operating expense or capital accounts of the Uniform System of Accounts. We have concluded that there is considerable merit to such criticism. No matter where the line be drawn with respect to either the general category of expenditures to be labeled as 'political' for purposes of accounting and reporting or assignment of particular costs, there will be many people who will believe that some expenditures so listed should not have been classified as political and others who will be equally convinced that certain operating expenses were in fact expenditures for political purposes. This does not mean, as some have suggested, that we should abandon our effort at separate classification and reporting of political expenditures, or even that we should limit our effort to those types of expenditures with respect to which all persons would agree in advance concerning the classification. But it does indicate that if we wish to define a class of expenditures for political purposes in a way which can be applied

with an appreciable degree of uniformity and comparability by the numerous public utilities, licensees and natural gas companies, we may have to forego inclusion of certain types of expense which *may* in fact be made for political purposes, but either usually are not, or are not subject to sufficiently clear definition to be capable of consistent application. Conversely the classification may encompass particular expenditures which usually are but which in a particular case may not have been made for political purposes.

Accordingly we are excluding from the text of Subaccount 426.4 the phrase 'or having any direct or indirect relationship to political matters, including the influencing of public opinion with respect to public policy,' and are adding thereto a clause excluding 'expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.' In addition we are changing the title of the subaccount. As modified, the subaccount will read as follows:

426.4 Expenditures for Certain Civic, Political and Related Activities

****3** This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption ***1541** of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances); or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

Several of the comments received stated that the amendment of Instruction No. 3 to the Schedule of Particulars Concerning Certain Income Deduction and Interest Charges Accounts in the Commission's Annual Reports, FPC Forms Nos. 1 and 2, to require individual reporting of all amounts of $100 or more charged to proposed Subaccounts 426.1, 426.2, 426.3 and 426.5, would impose a considerable burden upon the reporting utilities and encumber the Commission with details of insignificant expenditures. We believe that modification of Instruction No. 3 to allow grouping of any amounts of less than $1,000 in the aforesaid subaccounts for reporting purposes would eliminate these objections without conflicting with the overall purposes of the accounting and reporting amendments contemplated herein. Inasmuch as the books of reporting utilities have been closed for the reporting year 1962, we also conclude that the proposed amendments to our Uniform System of Accounts and annual report forms should be made applicable commencing with the reporting year 1963. In addition, although the new schedule for Subaccount 426.4 hereafter prescribed does not permit any grouping of expenditures, we will permit such grouping for reporting years which begin in 1963 in accordance with out outstanding requirements for earlier years.

A number of the comments upon the proposed amendments suggest that any effort to classify and require the special reporting of expenditures for political purposes would infringe upon freedom of speech and other constitutional guarantees, that the term 'political' will have a misleading connotation because of its utilization in certain state penal statutes concerning political activities, that the extension of the definition of political expenditures to those not specifically covered by the '*ECAP*' case* would be improper, and that the contemplated amendments are 'socialistic' in nature.

By requiring that expenditures for political purposes be placed in Subaccount 426.4 for accounting purposes, we do not impose any censorship or prohibition upon expenditures of that nature by electric and gas utilities. Moreover, this Commission in the afore-mentioned '*ECAP*' case rejected assertions that placing such expenditures in a 'below the line' account for accounting purposes constituted an infringment upon freedom of speech or other constitutional guarantees, and its opinion and order in that case was upheld by the courts. Nor do we find any sound basis for concluding that the mere designation of an expenditure as 'political' by this Commission will in itself signify improper or illegal conduct by the person or party making that expenditure. As mentioned above, however, we are changing the title of Subaccount 426.4. We note also that such classification does not constitute a determination that the expenditures should be excluded from a utility's cost of service in rate proceedings.

4 Whether a given utility's specific expenditures should be charged to Subaccount 426.4 or placed in an appropriate operating expense account must be determined, of course, in the first instance by a proper application of the standard set forth in the text of the subaccount, as here modified, by the officers of electric and gas utilities who are conversant with the day-to-day operations of their respective business entities. It should be recognized that certain expenditures, ***1542 such as those covering a trip to Washington, D.C., may involve a joint cost requiring allocation of the charge to Subaccount 426.4 and to another account or accounts. Although the preparation of an exhaustive list of items that normally should be placed in Subaccount 426.4 or in appropriate operating expense accounts would be impractical, particularly in the absence of specific fact situations, the following table illustrates the type of expenditures that it would appear should be placed in each category:

Subaccount 426.4

Advertising in various mass communication media to influence the election or appointment of public officers or proposed legislation at Federal, state, or local levels.

Advertising in mass communication media to promote legislation exempting independent producers of natural gas from Federal regulation.

Advertising in mass communication media to influence the general public or public officials on the private v. public power question. (Such advertising even where it has no specific or express objective is calculated to affect public or official attitudes toward future legislative or administrative action.)

Letters or inserts in customers' bills or in reports to stockholders to influence the opinion of recipients as to the election or appointment of public officers or pending legislation.

Payments for lobbying or other fees to persons or organizations including law firms, service companies or other affiliated interests, for influencing the passage or defeat of pending legislative proposals or influencing official decisions of public officers.

Payments for the preparation or distribution of editorial or cartoon material intended to influence the public on political matters.

Cost to utility of time utilized by employees in a house-to-house campaign or other devices for influencing public opinion as to public power or natural gas legislation together with associated company expenses.

Membership fees in organizations engaged in lobbyiing on legislative matters.

Cost to utility for meals, lodging and other personal and social items of persons involved in any of the above activities.

Operating Expense Accounts

Reasonable expenditures for promotional and 'good will' advertising.

Costs of appearances before the Federal Power Commission or other

Federal and State regulatory agencies in various regulatory proceedings.

Costs of submitting comments on this proceeding or other regulatory proceedings.

**5 Necessary appearances before or communications to Congress or legislative bodies regarding matters of direct operating concern to the utility company.

Appearances before zoning and tax appeal boards.

Appearances before municipal councils or other local authorities on charter or franchise

regulations of direct operating concern to the utility company.

Appearances before or communication with local bodies or officials regarding ordinances such as those concerning tree-trimming and safety of equipment.

Appearances before or communication with local bodies or officials concerning permits such as those for erecting poles on public property or obtaining rights of way.

With respect to reporting expenditures in Subaccount 426.4 in the new schedule for that purpose to be added to FPC Forms Nos. 1 and 2, the schedule itself is ***1543** largely self-explanatory. If a particular expenditure has been charged to Subaccount 426.4, the amount and nature thereof should be duly reported in the new schedule.

The Commission further finds:

(1) The notice and opportunity to participate in this rulemaking proceeding with respect to the matters presently before this Commission through the submission, in writing, of data, views, comments, suggestions and arguments in the manner as described above, are consistent and in accordance with all procedural requirements therefor as prescribed in Section 4 of the Administrative Procedure Act. In view of the foregoing and the modification of the proposed amendments to our accounting and reporting requirements to reflect valid objections raised thereto, opportunity for oral argument or a formal hearing in this matter would serve no useful purpose and is therefore unnecessary.

(2) In view of the foregoing and upon consideration of all relevant matters presented, adoption and promulgation of the proposed amendments of Account 426 of the Commission's Uniform Systems of Accounts for Public Utilities and Licensees and Natural Gas Companies and of FPC Forms Nos. 1 and 2 by the addition of the attached schedule for reporting expenditures for certain civic, political and related activities and the revision of Instruction No. 3 to the Schedule of Particulars Concerning Certain Income Deduction and Interest Charges Accounts contained therein for use in reporting for the calendar year beginning January 1, 1963, or subsequently during the calendar year 1963 if an established fiscal year is other than the calendar year, and years thereafter, are necessary and appropriate for the purposes of the Federal Power and Natural Gas Acts.

(3) Good cause exists for adoption and promulgation of the matters referred to above immediately upon issuance of this order; all as hereinafter provided.

The Commission, acting pursuant to the authority granted by the Federal Power Act, as amended, particularly Sections 3(13), 4(a), (b), (c), 301(a), 302, 304, 309 and 311 thereof (16

U.S.C. 796(13), 797(a), (b), (c), 825(a), 825a, 825c, 825h, and 825j) and by the Natural Gas Act, as amended, particularly Sections 8(a), 9, 10, and 16 thereof (15 U.S.C. 717g(a), 717h, 717i and 717***o***), *orders:*

****6*** (A) Account 426 of the Commission's Uniform Systems of Accounts for Public Utilities and Licensees and for Natural Gas Companies, Other Income Deductions, hereby is amended to include Subaccounts 426.1, 426.2, 426.3, 426.4, and 426.5, all set forth in the attachment hereto.

(B) Instruction No. 3 to the Schedule of Particulars Concerning Certain Income Deduction and Interest Charges Accounts in the Commission's Annual Reports, FPC Forms Nos. 1 and 2, 18 CFR 141.1 and 260.1, is hereby amended to read as follows:

3. Other Income Deductions (Account 426)—Report the nature, payee, and amount of other income deductions for the year as required by Subaccounts 426.1, Donations; 426.2, Life Insurance; 426.3, Penalties; and 426.5, Other Deductions, of the Uniform System of Accounts. Amounts of less than $1,000 may be grouped by classes within the above subaccounts if the number of items so grouped is shown. Additionally, report the total amount of income deductions included in Subaccount 426.4, particulars of which are contained in the separate schedule 'Expenditures for Certain Civic, Political and Related Activities.'

(C) FPC Forms Nos. 1 and 2 are hereby further amended by the addition of the new report schedule 'Expenditures for Certain Civic, Political and Related Activities' attached hereto for the reporting of such expenditures.

1544 (D) The amendments and revisions of Account 426 of the Commission's Uniform System of Accounts and FPC Forms Nos. 1 and 2, all as set forth in paragraphs (A) through (C) above, shall become effective upon the date of issuance of this order, and shall be utilized in accounting and reporting for the calendar year beginning January 1, 1963, or subsequently during the calendar year 1963 if an established fiscal year is other than the calendar year, and years thereafter.

(E) The Secretary of the Commission shall cause prompt publication of this order to be made in the Federal Register.

Commissioner Black, *concurring*.
Commissioner Woodward *dissenting*.

ATTACHMENT

Amendment to Parts 101, 104, 105, 201, 204, 205 (18 CFR Parts 101, 104, 105, 201, 204, 205)

Account 426, Other Income Deductions, appearing in each of the above-numbered parts, is amended to read:

426 Other Income Deductions

This account shall include miscellaneous expense items which are nonoperating in nature but which are properly deductible before determining total income before interest charges. The account shall be maintained according to subaccounts shown below.

426.1 Donations

This account shall include all payments or donations for charitable, social or community welfare purposes.

426.2 Life Insurance

This account shall include all payments for life insurance of officers and employees where company is beneficiary (net premiums less increase in cash surrender value of policies).

426.3 Penalties

This account shall include payments by the Company for penalties or fines for violation of any regulatory statutes by the company or its officials.

426.4 Expenditures for Certain Civic, Political and Related Activities

****7** This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

426.5 Other Deductions

This account shall include other miscellaneous expenses which are nonoperating in nature, but which are properly deductible before determining total income before interest charges.

NOTE.—The classification of expenses as nonoperating and their inclusion in this account is for accounting purposes. It does not preclude Commission consideration of proof to the contrary for ratemaking or other purposes.

***1545** Form Approved Budget Bureau 54–RO 05.19

BLACK, Commissioner, *concurring:*

The Commission in its order should make clear that the term 'political' in the title to subaccount 426.4 is used in its broadest meaning. The examples set forth in the order of types of expenditures which would be placed in this subaccount indicate that this is our intention, but I believe this should be specially emphasized.

The utilities and the advertising agencies have displayed great ingenuity in conveying a 'message' which is not always political in the ordinary sense of the word, but which concerns itself with problems of broad national social or economic policy. These efforts are intended to influence fundamental attitudes or beliefs and bear no reasonable relationship to the necessary operations of a utility company or the furnishing of utility service. The industry is, of course, free to spend its money this way, but such costs should be reported as income deductions below the line. Unless we make this clear, I am fearful that too restrictive an interpretation may be put on the language of subaccount 426.4 and expenditures for these purposes may be lost in various above-the-line operating expense accounts.

FEDERAL POWER COMMISSION

Footnotes

* Commission Opinion and Order No. 337, *Alabama Power Company, et al.*, 24 FPC 278, affirmed *sub nom Southeastern Electric Power Company* v. *F.P.C.*, 304 F. 2d 29, cert. denied, 371 U.S. 924.

30 F.P.C. 1539, 1963 WL 4051

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on March 26, 2021. Participants in the case will be served by the appellate CM/ECF system or by U.S. mail.

/s/ Jared B. Fish
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